Supreme Court of the United States,

OCTOBER TERM, A. D. 1912.

No. 250.

THE PULLMAN COMPANY, APPELLANT,

vs.

A. C. CROOM, COMPTROLLER OF THE STATE OF FLORIDA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

No. 507.

THE PULLMAN COMPANY, APPELLANT,

vs.

A. C. CROOM, AS COMPTROLLER OF THE STATE OF FLORIDA, AND W. V. KNOTT, AS TREASURER OF THE STATE OF FLORIDA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

BRIEF FOR APPELLANT.

I.

STATEMENT OF THE CASE.

The first action, No. 250, was by bill filed by the appellant to enjoin the appellee, as comptroller of the State of Florida (Rec., 15), from taking any proceeding to collect or enforce payment of any

sum claimed by said comptroller to be due January 1, 1910, and January 1, 1911, as a tax or penalty upon any gross receipts of appellant from its business done within the State of Florida, under the provisions of Section 47 of Chapter 5596 of the Laws of the State of Florida for 1907.

The Circuit Court having denied the application for injunction, holding that complainant could have no standing in equity to resist the tax levied until it should have made the return and paid the taxes provided for, the appellant thereafter made the reports for said years without paying the taxes claimed. Appellee, as comptroller, thereupon issued his warrant to the sheriff of Duval County, Florida, commanding him to collect the taxes for said years by levy and sale of property of appellant. The sheriff levied upon property of the appellant and appellant paid the taxes and costs to release the property from the seizure (Rec., 507, pp. 14, and 17 to 21, inclusive), and thereafter and on the 18th of December, 1911, filed its bill in the second case.

No. 507.

The bill in this case set up the proceedings in the first action, No. 250, and the payment under duress; sought to enjoin the appellee, Croom, as comptroller, from enforcing payment of any sum which the said comptroller might claim to be due January 1, 1912, as tax upon gross receipts of appellant from its business within the state under said Section 47 of Chapter 5596 (Rec. in No. 507, p. 16), and also praying that the appellee, Knott,

as treasurer of the State of Florida, be directed to repay to the appellant the amount of taxes and costs so paid to release the appellant's property from seizure.

Appellant is a corporation created by the State of Illinois, engaged in part in the business of furnishing sleeping and parlor cars to railroads throughout the United States for use by the railroads in transporting such passengers as desire extra accommodations not found in the ordinary railway coaches, and in such cars appellant furnishes sleeping berths by night, reserved seats or chairs by day and also furnishes food and refreshment to persons traveling, and it is the gross receipts of the appellant from its business in the cars as here set forth within the State of Florida that Section 47 of said Chapter 5596 requires shall be taxed at the rate of $1.50 upon each $100, and requires that a report thereof be made on or before the 1st day of January annually and the tax paid into the state treasury at the same time.

The property of sleeping and parlor car companies is also required to be assessed and taxed *ad valorem* by Section 46 of said Chapter 5596, which *ad valorem* taxes were assessed, and paid by appellant.

Chapter 5597, Laws of Florida for 1907, approved June 1, 1907, imposes license taxes for engaging in sleeping car and parlor car business, which license taxes were assessed and paid by appellant.

Such portions of Chapters 5596 and 5597 as bear

upon the issues in these actions are printed as an appendix to this brief and are referred to in the index hereto.

II.

Assignments of Error.

1st. The Circuit Court for the Northern District of Florida erred in holding that Section 47 of Chapter 5596 of the Laws of Florida, approved June 18, 1907, is within the legislative power of the state.

2nd. The said Circuit Court erred in holding that Section 47 of Chapter 5596 of the Laws of Florida, approved June 18, 1907, taken in connection with Chapter 5597 of the Laws of Florida, *approved the same day*, provides for a graded license tax on all sleeping and parlor car companies operating their cars in the State of Florida.

3rd. The said Circuit Court erred in holding that Section 47 of Chapter 5596, Laws of Florida, approved June 18, 1907, provides for a license tax.

4th. The said Circuit Court erred in holding that the complainant (appellant here) can have no standing in equity to resist the tax levied under said law until it shall have made the return provided for therein and paid the taxes thereon.

5th. The said Circuit Court erred in holding, in effect, that the tax provided by Section 47 of Chapter 5596 of the Laws of Florida, approved June 18, 1907, would not, if enforced, deprive the appellant of its property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

6th. The said Circuit Court erred in holding, in effect, that Section 47 of Chapter 5596 of the Laws of Florida, approved June 18, 1907, would not, if enforced, deny to appellant the equal protection of the laws in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

7th. The said Circuit Court erred in not granting the application of the appellant for an injunction as prayed for in its bill of complaint.

The appellant assigns all of the foregoing errors, with the exception of the 4th error assigned, in both of said cases, No. 250 and No. 507; the 4th error is assigned only in case No. 250.

Note—The italicized words in the second assignment of error follow literally the wording of the order denying the injunction, but are erroneous. According to the published Acts, Chapter 5597 was approved June 1, 1907.

III.

BRIEF OF ARGUMENT.

The questions here presented are:

1. Is the tax imposed by Section 47 of the Florida statute a license tax?

2. Is it valid under the constitution of that state whatever be its character?

3. Does the statute and imposition of the tax thereunder deprive the appellant of its property without due process of law or deny to appellant the equal protection of the laws in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States?

A. THE EXACTION IMPOSED ON SLEEPING AND PARLOR CAR COMPANIES BY SECTION 47, CHAPTER 5596, LAWS OF FLORIDA, 1907, IS NOT A LICENSE TAX.

The very nature of a license tax makes it absolutely requisite that the statute imposing it should definitely indicate and provide for what the tax is to be paid; that is, what privilege is to be secured to the payer that he would not otherwise have; what he shall be permitted to do which, without the payment, would not be permitted.

Youngblood v. *Sexton*, 32 Mich. 406.

State ex rel. Wyatt v. *Ashbrook*, 154 Mo. 375.

St. Paul v. *Traeger*, 25 Minn. 248.
Ellis v. *Frazier*, 38 Or. 462.
Chicago v. *Collins*, 175 Ill. 445, 457-8.
Banta v. *Chicago*, 172 Ill. 204, 219.
Cooley on Taxation, 3rd Ed., 1098, 1138-9.
Royall v. *Virginia*, 116 U. S. 572, 579.
Bradley v. *City of Richmond*, 33 Sup. Ct. Rep. 318, 319.

The gross receipts tax here involved was not provided for as a license tax and the provisions with respect to its imposition have none of the essentials of a license tax; no business or occupation was specified for which the tax was required as a condition of obtaining a license; no one on behalf of the state was authorized to collect it as a license tax, *and the first claim that it was a license tax was made in the Circuit Court in these cases.* There was no provision of law under which any official of the State of Florida could issue a license in consideration of the payment of the gross receipts tax, and none was ever issued upon payment of this identical tax under former statutes, nor under the 1907 statute (Sec. 47) for the years for which it has been collected; no provision making the right to conduct or to continue to conduct the sleeping car business in any way depend on payment of the gross receipts tax.

In *City of Chicago* v. *Collins*, *supra*, the Supreme Court of Illinois, quoting from Cooley on Taxation, said:

> "If what is to be done under the license is open to everyone without it, the grant would be

> merely idle and nugatory, conferring no privilege whatever."

In *Royall* v. *Virginia*, *supra*, this court said of a license and license tax (116 U. S. 572, 579):

> "The payment required as a preliminary to the license is in the nature and form of a tax, and is a due to the state which it may demand and exact from every one of its citizens who either will or must follow some business avocation within its limits to the pursuit of which the assessment is made a condition precedent."

The Supreme Court of Michigan in *Youngblood* v. *Sexton*, *supra*, said:

> "The object of a license is to confer a right that does not exist without a license. * * * Within this definition, a mere tax on the traffic cannot be a license of the traffic, unless the tax confers some right to carry on the traffic which otherwise would not have existed."

In *Pennsylvania* v. *Standard Oil Company*, 101 Pa. St. 119, the court said the tax was in no sense a license tax and that the state had never granted a license to the company to do business, but merely taxed its property.

Constitutional Provisions.

Section 1, Article 9 of the Florida State Constitution reads:

> "The legislature shall provide for a uniform and equal rate of taxation and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, excepting such property as may be exempted by law, for municipal, educational, literary, scientific, religious or charitable purposes."

Section 5 of the same article provides for county, city and township taxation and that:

> "The legislature may also provide for levying a special capitation tax, and a tax on licenses. * * *" (Balance of the section relates to capitation tax.)

Section 16 of Article 16 of the Constitution reads:

> "The property of all corporations, * * * shall be subject to taxation unless such property be held and used exclusively for religous, scientific, municipal, educational, literary or charitable purposes."

If the Constitution of Florida had simply provided that property (not exempted) should be taxed, it might be held that the legislature had the power to classify property and prescribe *how* it should be taxed; some by *ad valorem*, some by specific tax and some upon receipts or revenue derived from the use of the property, but the language of Sections 1 and 5 of Article 9 of the Constitution above quoted, specifying certain taxes which the legislature may provide in addition to a tax on property restricts the authority of the legislature.

Cheney v. *Jones*, 14 Fla. 587, 612, 613.

With respect to the constitutional limitation upon the authority of the legislature, the Supreme Court of Florida said in that case:

> "Were there not prescriptions in the constitution of the several objects or purposes for which the legislature may impose taxes, there would be no limitation upon the power except in the wisdom and discretion of the legislature. And it is not necessary that a limitation of power should be framed in express terms. If a

> power is granted to do certain things, as, for instance, the levying of taxes for certain specified and enumerated purposes and it is not *essential* to the carrying out of the purposes of the government that any such power should be exercised except for the purposes specified, the effect of such prescriptions is equally prohibitory as to the purposes not specified as though the prohibition were declared in affirmative terms." (Op., p. 612.)

And on page 613 the court also said of the constitution:

> "It prescribes what may be done, how far the legislature may go in levying taxes; and upon the principles alluded to, it is a limitation not wanting in directness to amount to a prohibition."

The legislature *must* provide, under Section 1, for a uniform and equal rate of taxation based upon a just *valuation of property*, and under Section 5 it *may* provide for a special capitation tax and a tax on licenses, and may provide *for those only*.

> *Afro-American Ins. Co.* v. *State*, 61 Fla. 85, 89.

The cases at bar were argued in the Circuit Court on behalf of the state upon the theory and claim that the tax imposed by Section 47 is a license tax and that court so held. Without conceding that to be the character of the imposition, we assume that the state will not claim otherwise here, in view of the provision (Section 1, Article 9, Florida Constitution) that taxation shall be by valuation, and the holding in *Pickard* v. *Pullman*, 117 U. S. 34, where this court said:

> "The tax was not a property tax, because, under the Constitution of Tennessee, all property must be taxed according to its value, and this tax was not measured by value, but was an arbitrary charge." (Opinion, page 43.)

The tax in that case, however, was specifically laid as a privilege tax.

Section 16 of Article 16 of the Florida Constitution does not enlarge the taxing power of the legislature with respect to corporations.

The gross receipts tax on sleeping car companies could not be held to be a license tax when not so designated unless the intention of the legislature to impose it as a license tax was plain, and even then, neither on principle nor authority, could such a tax obviously imposed for revenue by a statute discriminatory on its face, be sustained as a license tax.

History of the Legislation.

In 1907 there was a complete revision and reenactment of all the tax and revenue laws of the state. The new laws were contained in Chapters 5596 and 5597.

Chapter 5596 was "An Act relating to tax assessments and collection of revenue," approved June 18, 1907, Laws of Florida 1907, page 3, and contained all of the provisions of the state statutes relating to the assessment and collection of property taxes. Section 47 provides for the tax computed on gross receipts here in question, which was the same as in the previous law of 1895 to which we will refer later.

Chapter 5597 was the license tax Act, approved June 1, 1907, Laws of Florida 1907, page 36.

So much of those two Acts of 1907 as bear upon questions in these actions is printed in the appendix hereto and shown in the index.

The license tax Act of 1907 contains all of the essentials of the license provisions in the Act of 1895, including enumeration of business, occupations, etc., for which license should be required.

In Section 8 it is provided:

> "The owners, managers or agents of each of the following enumerated institutions, establishments, appliances and apparatus for the transaction of business, or the entertainment or accommodation of the public for profit shall pay the state license taxes set opposite their respective designation or definition in Schedule B below, to-wit:
>
> "SCHEDULE B.
>
> * * * (other enumerations omitted).
>
> "Sleeping and parlor cars, $25.00 for each car.
>
> "With buffet, $40.00 for each car."

Chapter 4322, Acts of 1895, page 3, was a complete revenue statute and embraced all of the provisions for the taxation of property and the taxation of licenses; Sections 9 to 13, inclusive, contained the provisions relating to license and license taxes, but did not provide for license tax on sleeping or parlor car companies; Section 47 contained provisions for the taxation of the property of railroad and sleeping car companies; railroad companies by *ad valorem* tax and sleeping and parlor car companies computed upon their gross receipts. Portions of the Act of 1895, sufficient to show the foregoing, are printed in the appendix and referred to in the index.

The tax computed on gross receipts of sleeping car companies was the *only tax* provided for such companies and their property in the law of 1895 and until the law of 1907, and in enacting the two chapters in 1907 referred to (5596 and 5597) the legislature completely separated the provisions relating to tax assessment of the state from those relating to licenses and license taxes of the state. In making this separation the provision for the tax computed on gross receipts was put with the property taxes in the *tax* assessment Act, while in the license Act there was, for the first time, a complete provision for a license tax on the business of sleeping car companies, *but it contained no reference to the gross receipts tax.* A gross receipts license tax for insurance companies was, however, provided *in the license tax Act,* along with the specific license tax.

Afro-American Ins. Co. v. *State, supra.*

There is nothing in the tax assessment law relating to license taxes and nothing in the license law relating to anything except licenses and license taxes.

NOT ENACTED AS LICENSE TAX.

These provisions—the separation of the subjects by the legislature—bear upon the *character of the tax* imposed by Section 47, Chapter 5596, laws of 1907 (the gross receipts tax), and upon the intention of the legislature in enacting it; that the legislature considered its power to tax licenses fully exercised when it enacted the license tax provisions for sleeping car companies in Chapter 5597, without any reference to the gross receipts tax provided

in the tax assessment chapter. It is apparent from those provisions and the history of the Florida legislation surrounding this subject that there was no intention on the part of the legislature to make the tax computed on gross receipts a license tax, and this is so persuasive as to be practically conclusive that the legislature did not so intend, but that the contrary appears. In the absence of anything indicating that the legislature did not intend to connect the two Acts they should not be construed together.

City of Burlington v. *Putnam Ins. Co.*, 31 Iowa 102, 105, where the court said regarding two Acts:

> "The two Acts do not relate to the same subject. The provision of the charter relates to the licensing of the insurance companies, and grants the power as a power of the police authority of the city. The section of the Act cited, as repealing this provision, relates to the taxation of insurance companies. These Acts, therefore, cannot be in conflict, and by no rule of construction can the last Act be held to repeal, by implication, the authority conferred in the charter to license insurance companies."

The tax involved in *Afro-American Ins. Co.* v. *State*, *supra*, was contained in two Acts, but they were directly connected by providing in the second act that companies doing business under the first Act should pay the additional tax provided for in the second Act.

In urging this we do not, of course, claim that the validity or invalidity of a tax depends upon its location in the statute, or that a tax if valid is made invalid either by misnomer or improper location in the statute, but on the other hand an invalid

and illegal tax cannot be made valid either by the legislature or the courts by merely giving it the name of a legal and valid tax. That an illegal tax may not be made legal by name or form has been held by this court so many times and so emphatically that we take it the last word on that point has been spoken.

Galveston, etc., Ry. v. *Texas*, 210 U. S. 217, 227.

Postal Tel. Co. v. *Taylor*, 192 U. S. 64, 73.

Railway Co. v. *State*, 49 Ohio St. 189.

Crenshaw v. *Arkansas*, 33 Sup. Ct. Rep. 294, 298.

So long as the state imposes and the taxpayer voluntarily pays an unconstitutional tax, who shall thereafter question the constitutionality of the tax, once it has been paid, or assert that its character was different from that in which it was *imposed and paid?*

McHenry v. *Alford*, 168 U. S. 651, 672-3.

This is not suggested by way of estoppel, and applies, of course, only to the taxes which have been collected. The payment of an illegal tax cannot be an estoppel with regard to the same taxes if *thereafter assessed for other periods*, and especially so where, as in this case, the situation has been changed by the imposition of other taxes not provided for by prior enactments under which the illegal tax was originally imposed.

In addition to the evidence in the statutes bearing upon the intention of the legislature with respect to the gross receipts tax, the construction

placed upon it by the officers of the State of Florida charged with the administration of the law is of moment and is a matter of which the court can take judicial notice. (Citing *Westbrook* v. *Miller,* 56 Mich. 148.)

Bloxham, Comptroller, v. *Consumers Elec., etc., Co.,* 36 Fla. 519.

As alleged in our bill these gross receipts taxes have been assessed during all of the years since 1895 and, until the years involved herein, were paid as a property tax and never as a license tax, and no license was provided for or issued on account of the payment. True, it was not a tax by valuation except as value may be measured by income, and was unconstitutional under Section 1, Article 9 of the Florida constitution, but it was nevertheless provided for, assessed and collected by the state, paid by the appellant for years, its constitutionality as a property tax was not questioned by either, and the state collected and retained the money.

McHenry v. *Alford, supra* (pp. 672-3.)

This court has repeatedly held that in assessing a property tax the value may be measured by the earnings of the property.

McHenry v. *Alford, supra.*

U. S. Express Co. v. *Minnesota,* 223 U. S. 335.

So that, but for the valuation provision of the Florida Constitution, these taxes, prior to 1907, would have been *valid* as property taxes.

TAX NOT CHANGED BY ACT OF 1907.

The point we seek to enforce here is that the character of the tax computed on gross receipts was not different, under the law of 1907, from the same taxes paid under the previous law and was not differently treated by the state officials.

The gross receipts tax prior to 1907 could not have been held to be a license tax, graded or otherwise, because neither sleeping car companies nor sleeping car business was mentioned in the license provisions of the statute; the sleeping car business was open and free to any person without a license and without payment of a license tax, and was not made in any way dependent upon the payment of the gross receipts tax. The license tax law of 1907 prohibited the doing of sleeping car business *unless the license tax specifically provided for therein* was paid, but the provision for the gross receipts tax was not changed; the doing of such business was no more made dependent upon payment of the gross receipts tax, by the 1907 statute, than it was prior to the enactment of that statute, and the tax could no more be a license tax taken in connection with the provisions of the license tax chapter, as the Circuit Court held, than it could have been a license tax before those provisions were enacted.

The statute does not connect the gross receipts tax with the license tax provisions.

Railway Co. v. *State*, 49 Ohio St. 189, 199.

The connection that upheld the gross receipts tax as a license tax upon insurance companies is lacking.

Afro-American Ins. Co. v. *State, supra.*

If the gross receipts tax be held a license tax, then *a single taxable privilege* is twice taxed. That may not be done.

Ex parte Sims, 40 Fla. 432, 440.
Canova v. *Williams*, 41 *id.* 509, 518-19.

In *Bloxham* v. *Consumers Electric Co.*, 36 Fla. 519, the Supreme Court of Florida in sustaining the tax there questioned said: "No showing is made of any double assessment or unequal, unjust or oppressive taxation," thus impliedly holding against those things.

We submit that the courts may not by judicial construction give to legislation an effect not intended, simply because the legislature had not the power to do what it evidently *did intend* but had the power to do something else, and hence hold the "something else" to be what was done. We do not think the doctrine that legislation should be upheld if possible, goes so far.

There is now reason for considering the gross receipts tax in connection with the *ad valorem* tax as *an attempt* to impose an additional property tax, as in *Galveston, etc., Ry.* v. *Texas* and *Meyer* v. *Wells, Fargo, supra*, but no reason whatever for considering it in connection with the license tax; reason for considering it in connection with other provisions in the same statute for the assessment of property taxes, but no reason for considering it in connection with another statute on another and separate subject passed at another time and containing no reference to it whatever.

City of Burlington v. *Putnam Ins. Co., supra.*

It seems to us that the learned Circuit Court must either have misunderstood the situation which we have here tried to set out, and which sems to us to have such an important bearing upon the character of the sleeping car gross receipts tax, or have treated that exaction as the *equivalent* of a license tax.

The legislature of Florida had power to impose a license tax and likewise the power to impose a property tax on such companies, but that furnishes no reason for calling its attempt to tax the gross receipts from property, purely for revenue, a license tax, or by judicial construction to connect it with the license taxes which were separately provided for.

With respect to the principle involved in that theory this court said in *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 519, with respect to taxing shares of a bank and its equivalent effect upon the shareholders:

> "It is said that where a tax is levied upon a corporation measured by the value of the shares in it, it is equivalent in its effect to a tax (clearly valid) upon the shareholders in respect of their shares, because, being paid by the bank, the burden falls eventually upon the shareholders in proportion to their holdings. It was upon this view that the lower court rested its opinion. But the two kinds of taxes are not equivalent in law, because the state has the power to levy one and has not the power to levy the other. The question here is one of power and not of economics. If the state has not the power to levy this tax, we will not inquire whether another tax which it might lawfully impose would have the same ultimate incidence. Precisely the same argument was made and rejected in *Owensboro Nat'l Bank* v. *Owensboro*, 173 U. S. 664."

In the Owensboro Bank case, *supra*, the court said:

> "The alleged equivalency, in order to be of any cogency, must of necessity contain two distinct and essential elements—equivalency in law and equivalency in fact. Does it contain either? is the question. To be equivalent in law, involves the proposition that a tax on the franchise and property of a bank or corporation is the equivalent of a tax on the shares of stock in the names of the shareholders. But this proposition has been frequently denied by this court." (pp. 676, 677.)

The court also said on page 683:

> "The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of serious consideration."

Questions pertaining very closely to those in the case at bar are embraced in *Pingree* v. *Auditor General* and *Telephone Company* v. *Auditor General*, 120 Michigan 95.

Under the constitution of Michigan the legislature was required to provide a uniform rule of taxation, except on property paying "specific taxes." The questions were, whether, first, the taxes were *ad valorem* or specific; second, if not specific were they valid? The court said, with respect to the *intention* as disclosed by the statute itself:

> "If the tax in this case is merely an *ad valorem* tax, if it is a tax on property—and this cannot be questioned, because the title and the Act both call it a tax on telegraph lines, which are property,—*there is nothing in the law to indicate that an occupation tax or tax upon business was intended*, even were we to hold that its

> *ad valorem* feature would not necessarily preclude its being denominated a specific tax." (Italics ours.)

In *Railway Company v. State, supra* (49 Ohio St. 189), the tax was a specific "fee" of $1.00 per mile for each mile of railroad track operated within the state in addition to the property tax by valuation imposed under the general taxing laws of the state. The constitution of Ohio required that property should be taxed by a uniform rule according to its value in money. The Supreme Court of Ohio held the "fee" was a tax and fell within the inhibition of the constitution in the particular just stated,

> "because the railway property, including tracks, within the state, is taxed by the general taxing laws of the state, at its true value in money and the tracks of a railroad, being part of its property, are subjected to a burden not imposed upon any other property within the state and not imposed 'according to its true value in money.'" (Op. p. 198.)

The court further said with respect to the nature of the tax:

> "The sum exacted is an arbitrary one, *having no apparent connection with any benefits conferred by the Act itself*, or that to which it is supplementary, and the law fails to attempt, in any manner whatever, to provide a method by which *any relation between the benefits and burdens* that it confers or imposes can be ascertained; but simply provides for the payment of a fixed sum which is to be applied solely to swell the general revenues of the state." (Italics ours.) (Op. p. 198.)

And, in conclusion, upon the same point said:

> "It bears no resemblance to, and should not

> be confounded with, that class of laws enacted by the legislature, the immediate object of which is to call into active operation the police powers of the state, but which, incidentally or indirectly, may cause the production of public revenue." (Op. p. 202.)

Every word of the above quotations from the Ohio Supreme Court might be well said of the tax under consideration here.

The tax in *Pickard* v. *Pullman*, *supra*, was not only a specific tax, but it was defined in the statute to be a privilege tax; the activities for which the tax was assessed were themselves defined by statute to be privileges and by the reference to the decision of the state court referred to in the last paragraph of the opinion of this court it would seem that the state court, without holding it definitely to be a tax, had sustained it upon the view that the property of a foreign corporation could be taxed as property or by an excise upon its use. (117 U. S. 51.)

We think it may safely be said that all of the license or occupation or privilege taxes which have been sustained by any of the courts, state or federal, have been imposed under statutes which either defined them specifically as license, privilege or occupation taxes or contained such provisions as made it clear that it was the legislative *intention* to provide for a license, privilege or occupation tax; that the statutes imposing the taxes contained something affirmative to indicate that such was the intention of the legislature and that the intention did not rest upon the entirely

negative evidence that the imposition was not valid as any other kind of a tax.

In the Tennessee license cases (*Pullman Southern Car Co.* v. *Nolan*, and other cases), 22 Fed. 276, Mr. Justice MATTHEWS, sitting in the circuit, said on page 279:

> "'A privilege' said the court in *Jenkins* v. *Ewin*, 8 Heisk. 456, 'is the exercise of an occupation or business which requires a license from some proper authority, designated by some general law, and not free to all, or any, without such license.' 'There is a clear distinction recognized,' says the Supreme Court of Georgia, in *Home Ins. Co.* v. *Augusta*, 50 Ga. 530, 'between a license granted or required as a condition precedent before a certain thing can be done and a tax assessed on the business which that license may authorize one to engage in.'"

There is no substantial difference between a privilege tax and a license tax. The words "license" and "license tax" are often used somewhat loosely in statutes, but it would not be claimed that a license tax is imposed only to cover the bare license issued to the licensee; the license *tax* is imposed as the consideration to be paid for the right or privilege to do the thing licensed.

In the cases at bar the attorney general relied in the Circuit Court upon a recent expression of the Forida Supreme Court in the case of *Afro-American Insurance Company* v. *The State* (not then reported). It has since been reported. In the report it appears the legislature of Florida passed an Act (Ch. 5459 Laws 1905) to define and regulate sick and funeral benefit insurance and therein provided a specific license tax for companies

engaged in that business. In enacting the general license tax law of 1907 (Chapter 5597) specific license taxes were provided for the insurance companies *there* defined (but not including sick and funeral benefit insurance companies), and in addition thereto two per cent. of the gross amount of receipts of premiums from policy holders of the companies *there* defined *and also from companies doing business under Chapter* 5459, *Acts of* 1905. What the court sustained was the percentage license tax on sick and funeral benefit insurance companies, the same as on other insurance companies. The provisions of the two statutes were so connected by specific language in the 1907 law with respect to the sick and funeral benefit companies that the court could not hold otherwise than that they should be construed together. The taxes upheld against the insurance company *were provided for as license taxes by the statute.*

> *Afro-American Ins. Co.* v. *State*, 61 Fla. 85, 89-90.

The court said on that point:

> "It will be observed that the legislature intended the tax in question as a license tax and so treated it."
>
> *Id.*, page 91.

That case does not uphold the contention that the gross receipts tax imposed upon the sleeping car companies is a license tax. Neither does *Johnson* v. *Armour*, 31 Fla. 413, where the tax upheld was provided for as a specific license tax, and it is immaterial whether the court called it a license tax or an occupational tax, especially in view of what the

same court held in *Afro-American Ins. Co.* v. *State, supra,* that but two kinds of taxes were permitted under the Florida constitution; *ad valorem* taxes and license taxes. (61 Fla. 89.)

All the elements and reasons for holding the insurance percentage tax in the Afro-American Ins. case and the specific tax in the Armour case to be license taxes are entirely lacking with respect to the tax involved in the case at bar.

Neither the provisions of the statute, the history of the enactments nor the decided cases will uphold the tax here in question as a license tax.

Double Taxation.

The statute upheld in *Osborne* v. *Florida,* 33 Fla. 162, and 164 U. S. 650, is in all its essentials the license tax law of 1907 (Chapter 5597). Under that chapter appellant paid its license taxes for the year ending October 1, 1909, amounting to $3,799, and for the year ending October 1, 1910, $3,634.75, and for the year ending October 1, 1911, $2,524.75. (Record No. 250, pp. 1 and 2.) These are the years (substantially as to period) for which gross receipts taxes are claimed by the state to have been due and to have been payable on the first days of the following January, respectively, and the same years (substantially corresponding as to period) for which appellant paid *ad valorem* taxes on all its cars and property and has paid all *ad valorem* taxes subsequently assessed. (Record No. 250, p. 2; No. 507, p. 2.)

When under the law of 1907, the state imposes and collects the license taxes just referred to it has

taken the "tax on licenses" permitted by the constitution of the state and the license tax law. Had the license been withheld the appellant would have been entitled to conduct its business for which it had paid the license tax, without a license *and without further payment or liability.*

Royall v. *Virginia, supra* (116 U. S. 572).
Ex parte Sims, *supra.*
Canova v. *Williams, supra.*

The state may not also collect another tax on the earnings from the property employed in the business which it has licensed. The same principle forbids it which this court held, in *Galveston etc. Ry.* v. *Texas*, and *Meyer* v. *Wells, Fargo, supra*, forbade the taxation of property and a further tax on the earnings of the property.

In *Newport* v. *Fitzer*, 131 Ky. 544, 115 S. W. Rep. 742, it was held that one who paid a peddler's license imposed by ordinance could not be compelled to pay a second license also imposed by ordinance for a cart used in the business.

In *New Galt House* v. *Louisville*, 33 Ky. L. Rep. 869, it was held that the city having collected a license fee from the appellant as a hotel keeper could not collect a second license provided, for a restaurant conducted by the licensee within the hotel.

In *Walker* v. *New Orleans*, 31 La. Ann. 828, the court held an ordinance requiring keepers of vehicles for hire, in addition to a general occupation tax, to purchase identification plates at an unreasonable price to attach to their vehicles, was un-

constitutional, as being merely a second license in disguise.

In *Williams* v. *Garignes*, 30 La. Ann. 1094, it was held a livery man who had paid an occupation tax could not be compelled to pay a license upon each horse, hack and buggy which he owned and without which he would be restricted in the pursuit of an already licensed business.

In *Chicago* v. *Collins, supra* (also a license case) the court said:

> "A statute which makes any kind of property the subject of taxation, and, discriminating, imposes upon it a double burden for a single object, makes even approximate equality and uniformity impossible, because it is an arbitrary and radical departure from both."

The same question arose in the State of Iowa. The City of Burlington was empowered to levy and collect taxes on all real and personal property not exempt from taxation, and also:

> "'to grant or refuse licenses' to insurance companies, other than mutual companies, and 'to require and receive for such licenses such sums of money as they may deem expedient and just.'"
>
> By ordinance of the city it was provided that "insurance companies or agencies shall pay into the city treasury quarterly, under oath, one per cent. on their premiums, and, in addition thereto, the following sums for licenses. * * *"

The Supreme Court of Iowa said:

> "It is necessary to consider the assessment of one per centum upon the amount of premiums received, and the amount imposed for a license, separately.
>
> "It cannot be fairly claimed that the one per

centum is a charge for license. The resolution authorizing the collecting of that sum expressly distinguishes the two. It in terms requires the payment of the one per centum, and then declares that there shall be collected 'in addition thereto the following sums for licenses,' specifying the amounts to be paid. The one per centum is clearly not required to be paid for or on account of the license. It is, then, an assessment in the nature of a tax."

The court upheld the specific license tax but held the percentage tax neither a license charge nor a valid tax.

City of Burlington v. *Putnam Ins. Co.*, 31 Iowa 102, 104.

We can see no particular in which the Burlington case differs from the case at bar.

There is no difference *in principle* between the situation in the case at bar and that in *Southern Ry. Co.* v. *Greene*, 216 U. S. 400. The opinion of this court in its entirety is utterly opposed to the theory that the tax could be upheld as "a tax to add to the license tax already required," *because* of the discrimination.

The Supreme Court of Florida has decided that one licensed to sell spirituous, vinous or malt liquors may not be subjected to an additional tax for the privilege of wholesale dealing in beer; that the right to deal in spirituous, vinous or malt liquors is one licensed privilege and constitutes but a *single taxable privilege*. (Italics the court's.)

Ex parte Sims, *supra* (40 Fla. 432, 440).

"The rule stated in the Sims case is not confined to dealers in spirituous, vinous and

malt liquors, but applies to each and every privilege taxed by the state."

Canova v. *Williams, supra* (41 Fla. 509, 518-19).

The Supreme Court of Florida has also decided that there must be no unjust discrimination in imposing license taxes. That court said:

"The constitution contains no express limitation upon the power of the legislature to provide for taxes on licenses; but such power should not be so exercised as to deprive any person of property without due process of law, or so as to deny to any person the equal protection of the laws."

Harper v. *Galloway*, 58 Fla. 255, 265.

The tax in question here is, like the tax passed on in *Pennsylvania* v. *Standard Oil Co., supra*, in no sense a license tax to do business; the state merely taxes the property, *but taxes it twice.*

B. The gross receipts tax is illegal as a property tax.

In view of the provisions of Section 1, Article 9, of the Constitution of Florida, the tax cannot be sustained as a property tax.

There can be but two kinds of taxes under the Florida Constitution, *ad valorem* taxes and license taxes.

Afro-American Ins. Co. v. *State, supra.* (61 Fla. 85.)

The tax in question is not *ad valorem.*

Pickard v. *Pullman, supra.* (117 U. S. 34, 43.)

But one property tax can be collected.

Galveston, etc., Ry. v. *Texas, Supra.* (210 U. S. 217.)

Meyer v. *Wells, Fargo, supra.* (223 U. S. 298.)

Minnesota v. *Union Depot Co.*, 42 Minn. 142.

If not a license tax the gross receipts tax must fall because not permitted under the Constitution of Florida, as construed by the highest court of that state.

C. THE PROVISION FOR THE GROSS RECEIPTS TAX AND THE ENFORCEMENT OF THE TAX PROVIDED FOR WOULD DEPRIVE THE APPELLANT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW AND WOULD DENY TO APPELLANT THE EQUAL PROTECTION OF THE LAWS.

The points and authorities already stated under the headings A and B go to this proposition as well.

The statutes of Florida provide for the taxation of property by *ad valorem*, but not for a separate and additional tax on the earnings from the property and business except with respect to sleeping car companies. The Constitution of Florida does not provide for the classification of property for taxation either by kind, ownership or use. The only classification is that made by the constitution itself into taxable property and property exempted from taxation. (Constitution, Section 1, Article 9.)

The classification mentioned in *Hayes* v. *Walker*, 54 Fla. 163, 172, is not plainly defined, but in any event it could not permit taxes other than by *ad valorem*. Under the great weight of authority but two kinds of taxes, *ad valorem* and license, are permitted under a constitutional provision like that of Florida. The Supreme Court of Florida has so held.

Afro-American Ins. Co. v. *State*, *supra*. (61 Fla. 89.)

The gross receipts tax in question is not a license tax.

Authorities, *supra.*

It is not an *ad valorem* tax, hence not a valid property tax.

Pickard v. *Pullman, supra.*

Afro-American Ins. Co. v. *State, supra.*

In any event Section 47 of Chapter 5596, whatever be the character of the tax, is but an attempt on the part of the legislature of Florida to impose on sleeping car companies and their property a tax and a burden not imposed on others, or on other property, either through oversight in leaving that provision in the statute after adopting the *ad valorem* tax for sleeping car property, or with the intention to produce discrimination and inequality of taxation. Whether oversight or intention, such an exaction is a taking of property without due process of law and is to deprive the person taxed of the equal protection of the laws.

Santa Clara County v. *Sou. Pac. R. Co.*, 18 Fed. 385, 399.

We recognize that unequal taxation alone growing out of overvaluation or by classification does not ordinarily amount to a deprivation of property without due process of law, or at any rate that the question in such a case is not open in this court if the state court shall have sustained the tax, but where the statute itself proceeds upon a wrong principle making an arbitrary exaction which, being unauthorized, is virtually no more than a forced contribution, then, within the rule of this court

as we understand it, the court will form its own independent judgment as to the scope and purpose of a statute and will for itself examine and determine whether there is a deprivation of property without due process of law, as well as whether there is a denial of the equal protection of the laws.

Morgan v. *Louisiana*, 118 U. S. 455, 462.

Collins v. *New Hampshire*, 171 *id.* 30, 34.

Atchison, etc., R. R. v. *Matthews*, 174 *id.* 96, 100-1.

Western Turf Ass'n. v. *Greenberg*, 204 *id.* 359, 362.

Galveston, etc., Ry. v. *Texas*, *supra*.

It was the wrong principle involved that condemned the tax imposed in *Fargo* v. *Hart*, 193 U. S. 490. This court there said it was not a question of overvaluation, but a difference in principle; and in *Raymond* v. *Chicago Traction* it was a difference in the method of assessing property of the same kind (207 U. S. 20, 38).

On principle it cannot be different in resulting burden on the taxpayer whether his property is *once* assessed and taxed by a wrong method which discriminates against him by increasing his taxes over those of other taxpayers, or whether his property is *twice* taxed, once by valuation and *again* upon the earnings it produces, and his tax thereby increased over other taxpayers, whose property is taxed but once. He is equally discriminated against and denied the equal protection of the laws in either case.

An exaction made without reference to a common ratio and without valuation, as required by the Constitution of Florida, is not a tax. This is not a

question of overvaluation, but the imposition of a tax by legislative act which provides for its assessment and for summary proceedings for its collection, not giving the taxpayer a hearing either judicially or otherwise. It is based upon a fundamentally wrong principle under the Florida Constitution and the statute imposing the tax is an arbitrary exercise of power and virtually provides for a forced contribution. Such arbitrary exactions not only deny the equal protection of the laws but amount to a taking of property without due process of law.

Duluth & I. R. R. Co. v. *St. Louis County*, 179 U. S. 302, 305.

Also concurring opinion of Mr. Justice White, with whom concurred Mr. Justice Harlan, Mr. Justice Gray and Mr. Justice McKenna, in *Stearns* v. *Minnesota*, *id.* 223, 262.

Bradley v. *City of Richmond*, *supra*.

DISCRIMINATION.

The equal protection of the laws is denied to appellant because by Sections 46 and 47 of Chapter 5596 Laws of 1907 both its property and the earnings thereof are taxed.

Galveston, etc., Ry. v. *Texas*, *supra* (210 U. S. 228).

Meyer v. *Wells, Fargo*, *supra*. (223 U. S. 301.)

Equal protection is denied because the laws of Florida impose an *ad valorem* tax upon appellant's property, a license tax for the privilege of doing business and an additional tax computed on its earn-

ings from the property taxed, imposed on no other property in the state. In *Southern Ry.* v. *Greene*, *supra*, a discrimination in imposing an additional license tax not imposed upon others was held a denial of equal protection of the laws. (Statement of case 216 U. S. 403; opinion, pp. 417-18.) The discrimination was between domestic and foreign companies; in the case at bar, as the law was construed by the Circuit Court holding it to be an additional license tax, it is a discrimination between sleeping car companies and all other companies or persons.

Section 46, Chapter 5596, provides for the taxation of railroad property and sleeping car property. Both classes of companies are required to return their sleeping and parlor cars for taxation, both are required to pay *ad valorem* taxes thereon and also specific license taxes under the separate license laws of the state, but the statutes of Florida do not provide for taxing the gross receipts from sleeping or parlor car business done by the railroad companies and *only* the sleeping car companies are required, *in addition* to the *ad valorem* and specific license tax, to return their gross receipts from their business for taxation and submit to a tax on both the property and its earnings. Such a discrimination cannot be sustained under the power of classification. This court has repeatedly so held.

Southern Ry. v. *Greene*, *supra*. (Op., p. 478.)

Gulf C. & S. F. Ry. v. *Ellis*, 165 U. S. 150, 155, 165.

In the latter case, it was said, page 165:

"It is apparent that the mere fact of class

> ification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

There is no real and substantial distinction, in fact no distinction whatever except the ownership of the cars, between sleeping car business done in the cars of a railroad company and that done in the cars of a sleeping car company and the tax provided on sleeping or parlor car companies is mere arbitrary selection.

The force of what this court said in the two cases just cited is in no way weakened by *Aluminum Company* v. *Arkansas*, 222 U. S. 251, or *Bradley* v. *Richmond, supra.*

In fact in the latter case all that this court had previously said regarding the reasonableness of a classification was upheld.

The court said:

> "An ordinance which commits to a board, committee or single official the power to make an *arbitrary* classification for purposes of taxation would meet neither the requirement of due process nor that of the equal protection of the law. (Italics the court's.)
>
> "But this ordinance does not authorize any arbitrary classification, *nor could the state* or the council legally confer or exercise arbitrary power in classifying for the purpose of either regulating, or licensing, or taxing. The guarantee of the Fourteenth Amendment would forbid. (Italics ours.)

> "But whether the power of classifying be exercised by the state directly or by a city council authorized to require the payment of such a tax as a condition to the issuance of the license, it is at last the exercise of legislative discretion and is subject, in either case, to the guarantee referred to."

The same doctrine has been fully recognized by the Supreme Court of Florida with respect to classification.

> *Seaboard Air Line Ry.* v. *Simon*, 56 Fla. 545.
> *Harper* v. *Galloway*, *supra*.

In the Seaboard Air Line case the court said the only question presented for determination was whether a statute authorizing an allowance of 25 per cent. per annum on the principal sum of a claim for goods lost while being transported by a railroad company, but not in the case of any other common carrier, was valid. The court said:

> "The guaranty of due process of law afforded by the constitution forbids the arbitrary exercise of governmental power by the legislature. An unreasonable classification of persons or corporations for the purposes of a legislative regulation that will be burdensome to those included in the class regulated, leaving others who are similarly conditioned with reference to the *subject regulated* free from the regulation and burden, may be an arbitrary exercise of governmental power. * * * The subject regulated is not peculiar to railroads, but is equally and similarly applicable to all common carriers of goods, whether the service is rendered by the use of railroads, boats or other means. If this statute is enforced and two entirely similar shipments are made at the same time between the same points, one by means of a railroad and the

other by means of a steamboat, and both shipments are lost in transit, the shipper may, under the circumstances stated in the Act, recover from the operators of the railroad 25 per cent. per annum in addition to the value of the goods lost by it; while, under exactly similar circumstances, only the value of the goods may be recovered from the operators of the steamboat. This is clearly an unjust discrimination against those operating the railroad, since there is apparently no real difference between the two common carriers with reference to the subject regulated, which is the payment of goods lost in transportation by a common carrier."

The court further on said:

"The subject of regulation in this case is not the operation of railroads, but it is the payment for goods lost in transportation by a particular kind of common carrier."

The court held the special classification in the statute violated the guaranties of due process of law and the due protection of the laws. (56 Fla. 545.)

Let us paraphrase slightly the simile of the Florida court above quoted and say in the case at bar:

"If this statute is enforced and two persons occupy accommodations in sleeping cars between points in Florida, one in a sleeping car owned by the railroad on which it runs and the other in the car of a sleeping or parlor car company running on another railroad, each company making a separate charge for the sleeping or parlor car accommodations, in addition to the transportation fare; the sleeping or parlor car company must pay to the state one and a half per cent. of what it receives from its patron for the accommodations furnished, but the railroad company is not subjected to that burden upon its earnings from precisely the same business; each

> company pays *ad valorem* taxes on the car which is used and each company pays the specified license tax provided by another statute for conducting its business. This is clearly an unjust discrimination against the owner of the sleeping car which does not own a railroad, since there is no real difference between the two common carriers with reference to the *subject* on which the tax is imposed, viz., the earnings from sleeping and parlor car accommodations."

The same doctrine with respect to classification of licenses and license taxes has also been fully recognized by the Supreme Court of Florida. In *Harper* v. *Galloway*, *supra*, the court said with respect to the classification of persons in obtaining licenses to hunt game and payment of special taxes therefor:

> "Classification of persons may be made in connection with the regulations, but such classifications should have some just relation to real differences with respect to the subject regulated, and should not be unjustly discriminatory or merely arbitrary. If this rule is not observed, classifications of persons in connection with the regulation of the hunting of game may deny to some residents of the state the equal protection of the laws." (58 Fla. 262.)

Almost the exact case arose in Texas where a statute imposing a tax on owners of sleeping cars for running them over the railway of another but exempting the act of running the same kind of cars over the road of the owners of the cars, was held unconstitutional.

> *Pullman Palace Car Co.* v. *State*, 64 Texas 274.

In the Texas case just cited the exemption was provided in the act; in the case at bar *the same ex*

emption was accomplished by expressly providing the tax for the sleeping car companies and failing to provide it for the railway companies.

SUMMARY PROCEEDINGS—NO HEARING.

The appellant in the cases at bar not having made its report it became the duty of the state comptroller to

> "estimate the amount of such gross receipts from such information as he may be able to obtain and shall add ten per cent. to the amount of such taxes as a penalty for the failure of such company to make report, and shall proceed to collect such taxes, together with all costs and penalties thereon, the same as other delinquent taxes are collected." (Section 47, Chapter 5596.)

The provision above quoted forms an alternative method of ascertaining the amount and assessing the gross receipts tax provided for in that section, in case the report is not made. Neither that section nor any other provision of the statutes provides for any hearing with respect to the determination or estimate of the amount of gross receipts or amount of the tax; no notice of the time or place where the tax will be estimated and determined. In case of proceeding under the alternative provision due process of law entitles the taxpayer to a hearing and to notice of the hearing.

It may be suggested that the taxpayer himself may obviate the necessity for a hearing by furnishing the report, but if he is willing to bear the penalty for refusing to make the report, in case his contention is wrong, then he is within his rights in

not making the report, but in that case, by the terms of the provision for the alternative method of ascertaining the tax, the legislature has delegated to an administrative officer the duty of fixing it, and the taxpayer is entitled to a hearing. The statute having failed to provide for a hearing, a necessary element of due process is lacking.

Chicago, etc., Ry. v. *Minnesota*, 134 U. S. 418, 457.

In the recent case of *Keenan* v. *New York*, 222 U. S. 525, 535, this court said:

> "The Fourteenth Amendment does not diminish the taxing power of the state, but only requires that in its exercise the citizen must be afforded an opportunity to be heard on all questions of liabilitity and value, and shall not by arbitrary and discriminatory provisions be denied equal protection."

If no hearing is provided for or if the right to be heard should prove illusory, the right to judicial review remains.

Bradley v. *Richmond*, *supra*.

Under these statutes of Florida as construed by the Circuit Court a most singular situation is presented:

The actual happenings in the cases at bar as disclosed by the record make it quite apparent that there has been an *actual* deprivation of property and a denial of equal protection of the laws in these very cases by the enforcement of an illegal state tax without opportunity to be heard thereon and up to this time without an available remedy legal or equitable to prevent it.

From the time the statute provided the report and payment should be due until the sheriff had seized the property of the appellant for purposes of sale under the comptroller's warrant and had compelled appellant to pay over $7,000, taxes claimed and costs, to release its property from seizure (Rec., No. 507, p. 14), there never was a time when, a proceeding whereby, nor a tribunal in which, appellant could be heard, if the Circuit Court was right, unless appellant should first report and pay the tax which, being a voluntary payment, appellant would thereafter have no remedy legal or equitable. Once the appellant made the report and paid the tax it was powerless. The State Supreme Court hold no action will lie to recover back.

Johnson v. *Atkins*, 44 Fla. 185.
Bloxham v. *F. C. & P. R. Co.*, 35 Fla. 625.
Ratterman v. *Express Co.*, 49 Ohio St. 608, 619-22.

Section 47 of the Florida Tax Statute goes a step beyond the statute condemned in *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79, 100, 102, where the court held a challenge to the statute was burdened by penalties; here a challenge is virtually prohibited.

See, also—

Ex parte Young, 209 U. S. 123, 146.

Appellant could not obtain possession of its property, which was necessary to enable it to fulfill its contract with the railroads, and to enable appellant to perform its duty to the public in furnishing cars and accommodations therein for public service (Rec., 250; pp. 9-10 and 14) except by payment of the amount claimed for taxes and costs.

No matter how flagrantly illegal a tax may be, the owner of property levied on may not otherwise obtain possession. There was no statutory provision under which appellant could be heard or its property be released on bond; or recovered by replevin. Section 2176 of the General Statutes of Florida in force at that time reads, with respect to the subject of replevin:

> "The affidavit shall state that the plaintiff is lawfully entitled to the possession of the property, (describing it, and stating its true value) and that the same has not been taken for any tax, assessment or fine levied by virtue of any law of this state."

Under the rule announced by this court in *Gaar, Scott & Co. v. Shannon*, 223 U. S. 468, 472, had the appellant reported and paid its tax, as the Circuit Court held it must, it could not maintain an action to recover the amount voluntarily paid even if the tax was illegal. In the case at bar such a payment would not have been under duress. The penalty provided for non-payment of the gross receipts tax by Section 47 is 10 per cent. added to the taxes, the customary penalty for non-payment of taxes, did not present a serious condition to be avoided and could hardly be considered such a duress as would take the payment out of the voluntary class, so it may be said if the appellant had paid voluntarily its money was gone and it was without recourse or remedy legal or equitable. Not having reported and paid, the Circuit Court held appellant had not given itself equitable standing by doing the very thing which would have taken away its remedy both legal and equitable.

We think the Circuit Court misconceived the situation in which the appellant would have stood if it had done what that court held to be a condition precedent to equitable standing.

Appellant by the averments of its bills has brought itself within the class as to whom the tax in question is unconstitutional in accordance with the rule stated in *Southern Ry.* v. *King*, 217 U. S. 524, 534, and cited in the Gaar, Scott case, *supra*.

In conclusion on this point:

The view most favorable towards the state's contention regarding the gross receipts tax, that can be taken under the statutes, is that not being a valid property tax the statute could not be sustained except upon the *theory* that it was an additional license tax, although not so defined, and also notwithstanding that the evidence afforded by the statutes themselves pointed to a contrary legislative intention, and also notwithstanding that even if it was a license tax it was so unjustly discriminatory that its enforcement would deny the appellant the equal protection of the laws. The learned Circuit Court took that most favorable view, and in so doing there was apparently lost to view the doctrine expounded by this court, speaking through Mr. Justice Bradley, nearly thirty years ago, and which had been adhered to by this court in all cases involving constitutional rights:

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and

> property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"
>
> *Boyd* v. *United States*, 116 U. S. 616, 635.

The above was quoted approvingly by Mr. Justice Brewer in *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 325, and again in *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150. In the latter case, after giving the above quotation, the justice said:

> "While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining state action." (165 U. S. 154.)

These two quotations, so closely related that the second is but an extension of the first, are particularly apt with respect to the situation disclosed by the record in the cases at bar.

D. THE INJUNCTIONS PRAYED FOR IN THE BILLS SHOULD HAVE BEEN GRANTED.

The Circuit Court held that appellant could have no standing in equity until it made the report and paid the tax provided for. The situation under the

Florida statutes and the decisions of the highest court of that state made it unnecessary for appellant to pursue that usually required course as a prerequisite to equitable relief. This feature has already been discussed and authorities cited.

By reason of the peculiar provisions of the statute the situation is unusual and not such that authorities may be found except as bearing upon the principle, but it is hardly to be imagined that appellant should be required to make a return under a void statutory provision and, at the time of making the return, to pay an illegal tax and thereby render itself without remedy, especially when it was provided by the same statute that the authorities, in the absence of the return, should proceed to the collection of the tax without such a return.

That provision itself was lacking in due process because it did not afford the taxpayer notice or hearing, but it was nevertheless a proceeding provided by the statute for fixing of a tax by a tribunal or officer to whom the legislature had delegated the authority to determine the *amount* of the tax and fix the *amount* of the *liability* of the taxpayer.

Due process of law under the 14th Amendment requires that the taxpayer be afforded an opportunity to be heard on such a question.

> *Keenan* v. *New York*, *supra*. (222 U. S. 535.)

The appellant's right to an injunction on the first bill (No. 250) is now a moot question by reason of the proceedings following the denial of the injunction by the Circuit Court and the enforced payment

by distress of the two years taxes, all of which is set up in the bill in No. 507. (Rec., No. 507, p. 14.) But appellant's right to an injunction under the second bill, No. 507, is not a moot question.

By the second bill (No. 507) appellant seeks, first, to enjoin the collection of further taxes about to be claimed as due, and, second, to have repaid to it the amount which it has been obliged to pay under duress. More than this, the claim under this statute is an annually recurring one and the question of the validity of the statute and the taxes thereunder is squarely presented in these actions. This court has announced that in such circumstances it will not regard the questions as moot, but will hear and determine them.

Similar questions were before this court in *United States* v. *Freight Association*, 166 U. S. 290; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, and *Southern Pacific Co.* v. *Commission*, *id.* 433.

In the Freight Association case, *supra*, the court held that although the association had been dissolved the injunction should go further and enjoin the defendants from entering into a similar agreement, or, as the court said: "In other words, the relief granted should be adequate to the occasion."

In the Commission cases, *supra* (219 U. S.), this court held similarly with respect to an injunction against the enforcement of an order of the Interstate Commerce Commission, the time fixed by the Commission's order having expired; that the questions involved in such orders are usually continuing, the court, therefore, denied the motion to dis-

miss the appeal because of the expiration of the time of the order and the fact that the question with respect to that particular order had become moot.

It would seem as though the reasoning should apply in these cases at bar, and as the validity of the tax in question possibly to some extent is bound up with other taxes imposed by the statutes of Florida it would seem, as was said by Mr. Justice HOLMES, in *Pullman Company* v. *Adams*, 189 U. S. 422, "that The Pullman Company was entitled to know how it stood"; if the tax is invalid it should be determined; if it is a license tax, as held by the Circuit Court, then whether it is lawful as a license tax or whether, being discriminatory, the appellant is denied equal protection; also the appellant should be entitled to know for what the license is imposed and what it is permitted to do upon payment of this tax which it would not otherwise be permitted to do, so that if the permitted thing or things be those which it is at liberty to renounce as in *Pullman* v. *Adams*, *supra*, it may exercise its rights in that behalf.

The ruling of the Circuit Court should be reversed; the appellant should be granted the injunction prayed for in the second action (No. 507), and the invalid taxes, the enforcement of which was made possible by the error of the Circuit Court, should be decreed to be repaid.

It is, of course, not claimed that mere illegality of the tax is sufficient to entitle appellant to an injunction. It must by proper averments show that it is entitled to equitable relief by injunction.

The only statute of the State of Florida under

which taxes could be contested was Section 2006 of the General Statutes of 1906, which was as follows:

> "In all cases where assessments are made against any person, body politic or corporate, and payment of the same shall be refused upon allegation of the illegality of such assessment, such person, body corporate or politic, may apply to the judge of the Circuit Court by petition setting forth the alleged illegality, and present the same, together with the evidence to sustain it, and the judge shall decide upon the same, and if found to be illegal, shall declare the assessment not lawfully made."

The remedy provided by this statute is confined to an illegal assessment.

Tampa v. *Muggs*, 40 Florida 326.

A petition under that statute must show that the illegality in the assessment exists at the time the petition is filed.

Pensacola v. *Bell*, 22 Florida 466.

And the statute is held to provide a summary remedy by petition only with respect to assessments in which there is an error on the face of the assessment roll.

Knight v. *Matson*, 53 Florida 609.

The remedy is not co-extensive with that afforded by a court of equity to prevent the collection of taxes. It is confined entirely to illegality of assessments, and reaches only illegalities in matters of law connected with the assessment.

Jackson County v. *Thornton*, 44 Florida 610.

Jackson County v. *South. Land & Timber Co.*, 45 Fla. 374.

Both the Supreme Court of Florida and this court has held the tax may not be paid and suit maintained to recover it back.

Johnson v. *Atkins*, 44 Fla. 184.

Bloxham v. *F. C. & P. R. Co.*, 35 Fla. 625.

Gaar, Scott & Co. v. *Shannon*, 223 U. S. 468, 472.

Appellant had no remedy at law.

Raymond v. *Chicago Traction Company*, *supra*. (207 U. S. 39-40.)

Union Pacific v. *Cheyenne*, 113 U. S. 516, 525, *et seq.*

Fargo v. *Hart*, *supra*.

The threatened injury by seizure of property, which the statute makes mandatory upon the comptroller, and the comptroller's demand and notice of his intended action thereunder (Rec., No. 250, p. 13; No. 507, p. 13), in the light of the holding of the Supreme Court of Florida that taxes voluntarily paid could not be recovered back, left appellant absolutely without remedy at law, and there was no way by which appellant could prevent the threatened injury except by payment of the tax.

In *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 12, this court said:

> "But the general doctrine of *Osborn* v. *Bank of the United States*, that the circuit courts of the United States will restrain a state officer from executing an unconstitutional statute of the state, when to execute it would violate rights and privileges of the complainant which has been guaranteed by the constitution, and would work irresaparable damage and injury to him, has never been departed from."

This language was quoted approvingly by Mr. Justice Peckham in the opinion of the court in *Ex parte* Young, *supra* (at page 152, 209 U. S.).

That the danger of the seizure and consequent injury to appellant and its property was actual and imminent is amply shown by the issuance of the comptroller's warrant; the seizure of property and the enforced payment of the tax as soon as the Circuit Court vacated its temporary restraining order in No. 250, as set up in our bill (Rec., No. 507, p. 14), whereby the appellant, in addition to having paid the *ad valorem* taxes on its property and the license taxes for the *single taxable privilege* of conducting its business, was obliged to pay a further tax of more than $7,000 on the earnings of its property, not imposed on earnings of railroad companies from the same business or on any other person, company or their property.

GUSTAVUS S. FERNALD,
Attorney for Appellant.

FRANK B. KELLOGG,
Of Counsel for Appellant.

APPENDIX.

LAWS OF FLORIDA 1895.

Chapter 4322—(No. 1).

An Act for the Assessment and Collection of Revenue.

Be It Enacted by the Legislature of the State of Florida:

Section 1. That all property, real and personal, in this State, not hereby expressly exempt therefrom, shall be subject to taxation in the manner provided by law.

Sec. 2. Real property. * * *

Sec. 3. The terms personal property and personal estate, as used in this chapter, shall have the same meaning, and shall, for the purpose of taxation, be construed to include all goods and chattels, moneys and effects, all boats and vessels, whether at home or abroad, all debts due or to become due, from solvent debtors, whether on account, contract, note or otherwise, all public stocks or shares in all incorporated or unincorporated companies.

* * * * *

Sec. 9. No person shall engage in or manage the business, profession or occupation mentioned in this section, unless a state license shall have been procured from the tax collector, or State Treasurer, which license shall be issued to each person on re-

ceipt of the amount hereinafter provided, together with the county judge's fee of 25 cents for each license. * * *

Counties and incorporated cities and towns may impose such further taxes of the same kind upon the same subjects * * * within such county, city or town. The tax imposed by such city, town or county shall not exceed 50 per cent. of the State tax.

(Enumerations of occupations with license tax follow.)

Sec. 10. Any person or persons, firm or association, that shall carry on or conduct any business or profession for which a license is required, without first obtaining such license, shall, except in such cases as are otherwise provided for in this act, be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not more than double the amount required for such license. The payment of all license taxes may be enforced by the seizure and sale of the property by the collector and it is hereby made a special duty of tax collectors and county judges to report to the Comptroller and State's Attorney any violation of this act.

* * * * *

Sec. 11. Every State or County license shall be furnished by the county judge under his seal of office to the tax collector on the blanks furnished by the Comptroller.

* * * * *

Sec. 12. Each county judge shall transmit to the Comptroller on the first Monday in each month, in each year, a statement showing the amount of money received for State license, under the provisions of

this act, * * * and the tax collector shall pay the amount collected by him for State licenses to the State Treasurer on the first Monday in each month.

* * * * *

Sec. 47. First part (omitted here) provides for return of property of railroads then follows the paragraph quoted, viz.:

"All sleeping and parlor car companies operating their cars in this State shall, on or before the first day of January, 1896, and annually thereafter, report under oath of the secretary or other officer of such company, the total amount of their gross receipts derived from business done between points in this State, and at the same time shall pay into the State Treasury the sum of $1.50 upon each $100 of such gross receipts, and if any such company shall fail to make such report and to pay the tax thereon as herein provided, the Comptroller shall estimate the amount of such gross receipts from such information as he may be able to obtain, and shall add 10 per cent. to the amount of such taxes, as a penalty for the failure of such company to make report; and shall proceed to collect such tax together with all costs and penalties thereon, the same as other delinquent taxes are collected."

* * * * *

Approved, June 1, 1895.

LAWS OF THE STATE OF FLORIDA, 1907.

Chapter 5596—(No. 1).

An Act Relating to Tax Assessments and Collection of Revenue. *Be it Enacted by the Legislature of the State of Florida:*

Section 1. That all real and personal property in this State, and all personal property belonging to persons residing in this State, not hereby expressly exempted therefrom, shall be subject to taxation in the manner provided by law.

Sec. 2. Real property. * * *

Sec. 3. Re-enactment of Section 3, L. 1895, *ante*. * * * * *

Sec. 46. The president and secretary, or superintendent or manager of any railroad company or street railroad company or sleeping or parlor car company, or the receiver thereof, whose car, track or roadbed, or any part thereof is in this State, shall annually, on or before the first Monday in March, return to the Comptroller of the State, under their oath, the total length of such railroad, the total length and value of such main track * * * (other railroad property) as of the first day of January. They shall also make return of the number and value of all locomotives, engines, passenger, sleeping, freight, parlor, platform, construction and other cars and appurtenances, and should any such company or its officers fail to make the returns required * * * or should the Comptroller have reason to believe that any return so made does not give a complete and correct value of such railroad

property, it is hereby made the duty of the Comptroller, Attorney General and State Treasurer, after having given not less than five days' notice to the person or persons making the return of the time and place of hearing, to assess the same from the best information they can obtain, specifying the value thereof in each county and the value of the locomotives, engines, passenger, sleeping, parlor, freight, platform, construction and other cars and appurtenances shall be apportioned by the Comptroller *pro rata* to each mile of main track, branch, switch, spur track and sidetrack * * * (method of distribution to counties, cities, etc.), and the value thereof shall be assessed by such city or town as provided by law, and upon the value thus ascertained and apportioned, taxes shall be assessed the same as upon the property of individuals. That every telegraph line in this State shall be returned and assessed in the manner as is provided by this act for the assessment of railroads * * * (provisions for enforcement).

Sec. 47. All sleeping and parlor car companies operating their cars in this State shall, on or before the first day of January, 1908, and annually thereafter, report to the Comptroller of the State of Florida, under oath of the secretary or other officer of such company, the total amounts of their gross receipts derived from business done between points in this State; and at the same time shall pay into the State Treasury the sum of $1.50 upon each $100 of such gross receipts, and if any such company shall fail to make such report to the Comptroller and pay the tax thereon as herein provided, the Comp-

troller shall estimate the amount of such gross receipts from such information as he may be able to obtain, and shall add 10 per cent. to the amount of such taxes as a penalty for the failure of such company to make report, and shall proceed to collect such tax, together with all costs and penalties thereon, the same as other delinquent taxes are collected.

Sec. 67. This act shall go into effect upon its passage.

Approved June 18, 1907.

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CHAPTER 5597—(No. 2).

An Act Imposing Licenses and Other Taxes, Providing for the Payment Thereof, and Prescribing Penalties for Doing Business Without a License, or Other Failure to Comply With the Provisions Thereof.

Be It Enacted by the Legislature of the State of Florida:

Section 1. No person, firm or corporation shall engage in or manage the business, profession or occupation mentioned in this act unless a State license shall have been procured from the Tax Collector of the county where the place of business may be located, or State Treasurer, which license shall be issued to each person, firm or corporation on receipt of the amount hereinafter provided, together with the County Judge's fee of 25 cents for each license countersigned by him. * * *

Sec. 2. Counties and incorporated cities and towns may impose such further taxes of the same kind upon the same subjects * * * within such county, city or town. The tax imposed by such county, city or town shall not exceed 50 per cent. of the State tax. * * *

Sec. 3. No license shall be issued for more than one year, and all licenses shall expire on the first day of October of each year. * * *

* * * * *

Sec. 4. All licenses shall be payable on or before the first day of October of each year, and no license shall be issued for any fractional portion of a year, except. * * *

Sec. 5. That the following enumerated individual license taxes shall be paid to the State by the persons engaged in, managing or transacting the several occupations or professions named, to-wit:

"Schedule A."

(There follow various enumerations here omitted.)

Sec. 8. (Contains various enumerations here omitted.)

* * * * *

The owners, managers or agents of each of the following enumerated institutions, establishments, appliances and apparatus for the transaction of business or the entertainment or accommodation of the public for profit, shall pay the State license taxes set opposite their respective designations or definitions in Schedule B, below, to-wit:

"SCHEDULE B."

(Various enumerations here omitted.)

* * * * *

"Sleeping and parlor cars, $25 for each car.
"With buffet, $40 for each car."
(Page 53, L. 1907.)

SEC. 11. Any person or persons, firm or corporation or association that shall carry on or conduct any business or profession for which a license is required, by either this or any other act, without first obtaining such license, shall, except in such cases as are otherwise provided by law, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than double the amount required for such license. The payment of all license taxes shall be enforced by the seizure and sale of the property by the Collector or in case of State license taxes payable either to the State Treasurer or the Comptroller, by the State Treasurer or the Comptroller, as the case may be.

* * * * *

SEC. 12. Every State or County license shall be furnished * * * on the blanks published by the Comptroller, * * * and the Tax Collector shall fill out and sign each license before issuing the same to the person or persons paying him the necessary amount therefor. * * * The person or persons obtaining such license shall keep the same exhibited conspicuously at their place of business, and upon failure to do so shall be subject to another license for engaging in or managing the business or occupation for which such license was obtained. * * *

SEC. 13. * * * and the County Judge, and the Tax Collector shall pay the amount collected by him

for State licenses to the State Treasurer on the first Monday in each month.

* * * * *

Approved June 1, 1907.

CHAPTER 5623—(No. 28).

AN ACT To Impose License Taxes on Railroad Companies.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Any railroad company doing business in this State shall pay annually on the first day of October to the Comptroller of the State a sum equal to ten dollars for each and every mile of its railroad tracks in this State, including branches, switches, spurs and sidetracks, as shown by the last assessment of the said railroad company for property taxation, as a license tax, one-half of which amount shall be paid into the State Treasury, and one-half of which amount shall be distributed immediately by the Comptroller to the various counties in which such railroad may be located, proportioned to the amount of railroad trackage in each county, which license tax shall be in lieu of all other State and County license taxes on said railroad companies.

* * * * *

Approved June 3, 1907.

SEP 16 1913
JAMES H. McKENNE

Supreme Court of the United States

OCTOBER TERM, 1912.

THE PULLMAN COMPANY,
Appellant,

v.

A. C. CROOM, Comptroller of the State of Florida,
Respondent.

No. 28

THE PULLMAN COMPANY,
Appellant,

v.

A. C. CROOM, Comptroller, and W. V. KNOTT, Treasurer,
Respondents.

No. 158

SUPPLEMENTAL BRIEF FOR APPELLANT.

GUSTAVUS S. FERNALD,
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FRANK B. KELLOGG,
Of Counsel.

INDEX TO SUPPLEMENTAL BRIEF.

	Brief Page.
REASONS FOR THIS BRIEF	1
CLAIMS OF COMPLAINANT	2
ARGUMENT OF POINT THAT IT IS NOT AN AD VALOREM TAX BASED UPON A JUST VALUATION OF ALL PROPERTY, ETC	3
ARGUMENT OF POINT THAT IT IS NEITHER A CAPITATION TAX NOR A LICENSE TAX	10
APPENDIX	28
Excerpts from Ch. 5459, Laws of Florida, 1905	28
Excerpts from Ch. 5596, Laws of Florida, 1907	29
Excerpts from Ch. 5597, Laws of Florida, 1907	33
Excerpts from General Statutes of Florida, 1906	37

LIST OF CASES REFERRED TO.

Afro Am. Industrial etc. Co. v. State, 61 Fla. 85 ..... 3, 4, 9, 10, 11
Attorney-General v. Winnebago Lake etc. Road Co., 11 Wis. 35 22
Cheney v. Jones, 14 Fla. 587 9
City of Brookfield v. Tooey, 141 Mo. 619 ..... 4, 8, 11, 13
City of Burlington v. Putnam Ins. Co., 31 Iowa 103 20
Drew v. Tift, 79 Minn. 175 3
Ellis v. Frazier, 38 Oregon 462 15
Galveston, Harrisburg, etc. Ry. v. Texas, 93 S. W. Rep. 436; S. C., 210 U. S. 217 23
Home Ins. Co. v. City Council of Augusta, 50 Ga. 530 21
Parker, Tax Collector, v. North British M. Ins. Co., 42 La. Ann. 428 24
Pennsylvania v. Standard Oil Co., 101 Pa. St. 119 ..... 11, 18
Pickard v. Pullman, 117 U. S. 34 ..... 3, 5, 10
Pingree v. Auditor General, 120 Mich. 95 18
Pullman Southern Car Co. v. Noland, 22 Fed. 277 19
Railway Co. v. State, 49 Ohio St. 189 ..... 3, 4
Rice County v. Citizens Nat. Bank, 23 Minn. 280 ..... 3, 7
Royall v. Virginia, 116 U. S. 572 11
State v. Canda Cattle Car Co., 85 Minn. 457 ..... 3, 6, 11, 15
State v. Cumberland Railroad Co., 40 Md. 22 ..... 4, 8
State v. Duluth & Iron Range R. R., 77 Minn. 433 ..... 3, 7
State v. Express Company, 60 N. H. 233 25
State v. Lakeside Land Co., 71 Minn. 283 7
State v. United States Express Co., 114 Minn. 348 7
State ex rel Wyatt v. Ashbrook, 154 Mo. 375 ..... 11, 14
Youngblood v. Sexton, 32 Mich. 406 ..... 11, 17

STATUTES OF FLORIDA CITED IN THE BRIEF AND PRINTED IN APPENDIX.

	Brief Page.
Chapter 5459, Laws of Florida, 1905	28
General Statutes of Florida, 1906, Title VI	37
Chapter 5596, Laws of Florida, 1907	26, 29, 30, 31
Chapter 5597, Laws of Florida, 1907	11, 33, 34

Supreme Court of the United States

OCTOBER TERM, 1912.

THE PULLMAN COMPANY,
Appellant,

v.

A. C. CROOM, Comptroller of the State of Florida,
Respondent.

No. 250.

THE PULLMAN COMPANY,
Appellant,

v.

A. C. CROOM, Comptroller, and W. V. KNOTT, Treasurer,
Respondents.

No. 307.

SUPPLEMENTAL BRIEF FOR APPELLANT.

When we came to examine this case carefully for the purpose of argument, we found a number of authorities which seemed to us should be called to the attention of the court, and so that counsel on the other side may have opportunity to consider them, we have taken the liberty of re-stating two of the propositions

in this case and citing the authorities thereon in a supplemental brief.

Under the laws of Florida the property of sleeping and parlor car companies is subjected to three forms of taxation, and no other companies or corporations doing business in the state are likewise assessed:

First, they pay an ad valorem tax based upon the assessed value of their property, which tax, under the constitution, must be by a "uniform and equal rate of taxation throughout the state;"

Second, they pay a license tax for engaging in the sleeping and parlor car business: $25. for each sleeping and parlor car, and $40. for each buffet car.

Third, in addition to this, they are required to file a statement of their gross earnings within the state, and the comptroller is required to assess one and a half per cent of these gross earnings and to collect it by summary process.

It is to enjoin the comptroller and treasurer from issuing a process and collecting this tax that the two suits were brought. The claim of the complainant is:

(a) That this is not an ad valorem tax based upon a "just valuation of all property" and provided for by "a uniform and equal rate of taxation" throughout the state, under the following provisions of the constitution:

> "The legislature shall provide for a uniform and equal rate of taxation, and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, excepting such property as may be exempt," etc.

(b) That it is not a capitation tax or a license tax provided by Section 5 of the constitution, which reads as follows:

"The legislature may also provide for levying a special capitation tax and a tax on licenses."

(a) THIS IS NOT AN AD VALOREM TAX BASED UPON A "JUST VALUATION OF ALL PROPERTY" AND PROVIDED FOR BY "A UNIFORM AND EQUAL RATE OF TAXATION" THROUGHOUT THE STATE.

Little argument is necessary to demonstrate this first proposition. The bill in both cases alleges that there is levied on the property of the Pullman Company an ad valorem tax, the same as on railroads and other property, and that such taxes are levied upon the full assessed valuation of said property "at the regular rates and percentages of taxes levied upon other property within the state and in the various counties respectively in which said taxes were paid." (Record No. 250 and No. 507, pg. 2.)

Of course the rate of 1½% on gross earnings is not equal and uniform with the rate throughout the state levied on the ad valorem basis. Again, under this provision of the constitution, it is not based upon a just valuation of all property both real and personal. Under the authorities such a tax is in violation of the provision of the Florida constitution.

Afro-American Industrial & Benefit Ass'n of the United States of America v. State, 61 Fla. 85, 54 So. 383;
Pickard v. Pullman, 117 U. S. 34;
R'y Co. v. State, 49 Oh. St. 189;
State v. Canda Cattle Car Co., 85 Minn. 457;
Rice County v. Citizens' Nat'l Bank, 23 Minn. 280;
State v. Duluth & Iron Range R. R. Co., 77 Minn. 433;
Drew v. Tift, 79 Minn. 175;

City of Brookfield v. Toocy, 141 Mo. 619.
State v. Cumberland, etc., R. R., 40 Md. 22.

As we understand it, no claim was made in the court below that the tax in question was authorized by the provision of the constitution for levying ad valorem taxes. In fact, as we shall see when we come to consider the question of a tax on licenses the court held that a 2% gross earnings tax on a certain specified class of insurance was not levied in accordance with the foregoing constitutional provision. The court said:

> "The defendant contends that, under the provisions of sections 1 and 5 of article 9 of the state Constitution, only two classes of taxes can be levied in this state, an ad valorem tax and a tax on licenses. The correctness of this contention may be conceded. We might concede the correctness of the further contention of the defendant that 'in laying an ad valorem tax, a valuation of the property of each person or corporation liable to be taxed is an absolute necessity. In no other way can the amount to be paid by each taxpayer be ascertained. A valid assessment is therefore indispensable.' See *27 Amer. & Eng. Ency. of Law* (2d Ed.) 660, cited by the defendant. But, conceding this, we fail to see its applicability to the instant case, since the tax in question is not an ad valorem tax. In so holding we again find ourselves in full accord with the defendant." (Page 384, 54, So. Rep.)

In the case of *Railway Co. v. State*, 49 Oh. St. 189, the legislature provided for a tax or specific "fee" of one dollar per mile for each mile of railroad track operated within the state in addition to the property taxed by valuation. The constitution of the state of Ohio at that time provided:

> "Laws shall be passed taxing by a uniform rule all moneys, credits, investments * * * and also all real and personal property according to its true value in money."

The Supreme Court held that this tax was void, and said:

> "If this exaction from railroad companies, imposed according to trackage, is a tax, within the meaning of the constitution, then it falls within the inhibition of both of those sections of our constitution. Within the inhibition of section 11, because the railway property, including tracks, within the state, is taxed by the general taxing laws of the state, at its true value in money, and the tracks of a railroad, being part of its property, is subjected to a burden not imposed upon any other property within the state, and not imposed 'according to its true value in money;' and within the inhibition of section 5, because it fails to state the object for which the tax is levied." (Page 198.)

In the case of *Pickard v. Pullman*, 117 U. S. 34, a tax of $50.00 per annum was imposed on every sleeping car coach used or run over a railroad in Tennessee and not owned by the railroad. Section 28 of Article 2 of the Constitution of Tennessee of 1870, contains these provisions:

> "All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state."

The Supreme Court, by Mr. Justice Blatchford, said:

> "The tax was not a property tax because under the constitution of Tennessee all property must be taxed according to its value, and this tax was not

> measured by value, but was an arbitrary charge." (Pages 43 and 44.)

In the case of *State v. Canda Cattle Car Co.*, 85 Minn., 458, the Constitution of Minnesota provides:

> "That all taxes to be raised shall be as nearly equal as may be, and all property upon which the same are levied shall have a cash valuation and be equal and uniform throughout the state."

A law was passed requiring cattle car companies to file a statement showing the number of shares of capital stock, the par and market value thereof, the value of real estate owned by it, the length of railways over which its cars are run, the length of such lines within and without the state and the whole number and value of its cars. The state board of equalization was to fix the assessable value of the property from this information and to levy 2% thereon. Other property throughout the state was assessed a varying percentage sufficient to meet the amount of taxes raised. The court held the law unconstitutional, and among other things said:

> "The act under consideration fixes a uniform rate of two per cent upon the valuation of the property of corporations coming within its operation, while the general rate of taxation upon other property in the state is fixed and determined by the amount of taxes necessary to be raised for the purposes of defraying the public expenses. It may be one, two, three, or four per cent. The contention of defendant is that the rate so fixed by the act is in violation of the equality provision of our constitution and consequently void. We think, for reasons already stated, defendant's position must be sustained. *City of Brookfield v. Tooey* 141 Mo. 619, 43 S. W. 387; *State v. Lakeside Land*

Co., 71 Minn. 283, 73 N. W. 970; *State v. Cumberland*, 40 Md. 22." (Page 462.)

In the case of *State v. Lakeside Land Co.*, 71 Minn. 283, the court held that a commuted system of taxation providing for a tax of 1 cent a ton on all ore mined in lieu of the ad valorem tax, to be in violation of this provision of the constitution. The court said:

> "It would be difficult to conceive of a system of taxation more obnoxious to the constitution."

The same court held a tax on gross earnings in violation of this provision of the constitution in the cases of *Rice County v. Citizens' Nat'l Bank*, 23 Minn. 280, and *State v. Duluth & Iron Range R. R. Co.*, 77 Minn. 433. In the latter case the court said:

> "Under the provisions of our constitution requiring uniformity of taxation and requiring all property except certain specified exemptions, to be assessed for taxation according to its true value in money, the legislature had no power to pass a gross earnings law except as permitted by said constitutional amendment of 1871."

Subsequently the Minnesota constitution was amended so as to allow a gross earnings tax. *State v. United States Express Co.*, 114 Minn. 348. And this tax apportioned on a mileage basis was held to be fairly representative of the property and therefore not a tax on interstate commerce in violation of the federal constitution. 223 U. S. pg. 335. The Supreme Court of Minnesota and this court held that this was a property tax; that is, fairly representative of the property within the state. But the constitution of Minnesota does not now contain the provision as to uniformity or cash valuation contained in the

constitution of the state of Florida; and, conceding it to be a property tax, still, there is no pretense that it was levied on the cash valuation or that it was under a uniform rate.

In the case of *City of Brookfield v. Toocy*, 141 Mo. 619, the ordinance of the city imposed a tax of 1% per annum upon the cash value of goods. The court held it to be in violation of Sections 3 and 11, of Article 10 of the Constitution of Missouri, because not uniform upon all personal property in the city. It was also held not to be a license tax. We shall quote from it upon another branch of this case.

In the case of *State v. The Cumberland & Pa. R. R. Co.*, 40 Md. 22, a tax of 2 cents per gross ton was imposed on all coal mined and shipped to any place in the state. The constitution provided as follows:

> "Every person in the state or person holding property therein ought to contribute his proportion of public taxes for the support of government according to his actual worth in real or personal property."

The court held that this tax violated the uniformity and cash valuation provision of the constitution.

After stating that the capital stock of the mining company was subject to taxation, and as the stock was representative of the property, the payment of the tax on the capital exempted the property, the court said:

> "And although the State may elect to tax either the capital stock, or the real and personal property of the company yet it cannot tax both; and if it elect to tax the real and personal property, and not the stock, such property must be assessed according to the same equal and uniform rate, in

proportion to its value, as all other property in the State, whether owned by individuals or corporations. It is not competent to the Legislature to discriminate as between the different species of property, and to tax some by one rule and some by another. All must bear the burthen alike; for if it were otherwise, it would be impossible to observe the rule, which requires that every person in the State, or person holding property therein, shall contribute his proportion of public taxes for the support of government, according to his actual worth in real or personal property."

As we have seen, the Supreme Court of Florida has held that only three forms of taxes can be levied: the ad valorem tax, the capitation tax, and the tax on licenses; and that the constitutional provision which provides for this is a limitation upon the authority of the legislature to provide any other.

Cheney v. Jones, 14 Fla. 587;
Afro-American Ins. Co. v. State, 61 Fla. 85.

In the former case the court said:

"Were there no prescriptions in the constitution of the several objects or purposes for which the legislature may impose taxes, there would be no limitation upon the power except in the wisdom and discretion of the legislature. And it is not necessary that a limitation of power should be framed in express terms. If a power is granted to do certain things, as, for instance, the levying of taxes for certain specified and enumerated purposes and it is not essential to the carrying out of the purposes of the government that any such power should be exercised except for the purposes specified, the effect of such prescriptions is equally prohibitory as to the purposes not specified as

> though the prohibition were declared in affirmative terms." (Op. p. 612.)

And on page 613 the court said of the constitution:

> "It prescribes what may be done, how far the legislature may go in levying taxes; and upon the principles alluded to, it is a limitation not wanting in directness to amount to a prohibition."

(b) THIS IS NOT A CAPITATION TAX OR A LICENSE TAX PROVIDED FOR BY SECTION 5 OF THE CONSTITUTION.

Of course no argument is necessary to show that this is not a capitation tax. The court below held it to be a license tax. We believe we can demonstrate that in this the court below was in error. It was not imposed by the legislature as a license tax, it was not so designated, nor has it any of the elements of a license tax. It was enacted as a section of a statute imposing direct taxes for general revenue purposes, and is a part of the statute taxing all other property for such purposes. It is not called a license tax or a privilege tax. It is not imposed as a condition of the right to engage in business or to exercise any privilege; in fact, a license tax had already been imposed, which had been paid and the license issued, and the company is transacting its business under the same. No permission is granted, and no officer could issue any license or privilege under this law. It is a direct burden on the property of the company. Its imposition depends on no condition whatever.

Afro-American Industrial, etc. Association v. State, 61 Fla. 85; S. C. 54 Southern, 383;
Pickard v. Pullman, 117 U. S. 34;

City of Brookfield v. Toocy, 141 Mo. 619.
State ex rel. Wyatt v. Ashbrook, 154 Mo. 375;
Youngblood v. Sexton, 32 Mich. 406;
Royall v. Virginia, 116 U. S. 572;
Pennsylvania v. Standard Oil Co., 101 Pa. St. 119;
State v. Canda Cattle Car Co., 85 Minn. 457.

We believe that the court below fell into error in the case of *Afro-American Industrial & Benefit Assurance Association v. Florida*, 61 Fla. 85, and that the same court has changed its ruling in another case between the same parties involving the tax of 1912. The court has lately granted a temporary injunction on condition that the company pay the money into court pending the decision. As a matter of fact, the tax under consideration in the Afro-American Assurance case was imposed as a license tax. It was contained in a separate statute passed in 1907, imposing various license taxes. It contained every element of a license tax. It was imposed as a condition of transacting the business of insurance within the state. The language of the act and every provision as to the issuance of the license indicate that it was a privilege tax pure and simple. We quote the provision of the statute which imposed this license tax, as follows:

> "That each insurance company or association, firm or individual doing business in this State * * * shall pay to the State Treasurer a license tax of $200 * * *; and in addition thereto each of said companies shall, upon the 1st day of January after the passage of this act, and on the first day of each succeeding January thereafter, pay to the State Treasurer two per cent of the gross amount of receipts of premiums from policy holders in this State. Companies or associations doing business un-

> der Chapter 5459, Laws of Florida, acts of 1905, shall pay to the State Treasurer two per cent of the gross amount of receipts from policy holders in this State. * * * That each insurance company shall pay to the State Treasurer for each traveling agent or solicitor doing business in this State a license tax of twenty-five dollars."

In the case at bar the law was Section 47 of Chapter 5596 of the General Revenue Laws of 1907, imposing direct taxes on all real and personal property in the state, including sleeping and parlor cars. There is not a word in the entire statute to indicate that this was imposed as a license or privilege tax, and as we have seen, it contains none of the elements thereof. In order that the court may have before it clearly the language of the two acts, we print a more extended statement of these two statutes as an appendix to this brief. The tax in question has never been treated either by the legislature or by the state officials as a license tax. It was imposed unconditionally as a direct burden upon the property of the corporation.

It will be noticed that the reasons assigned by the Supreme Court of Florida for holding the gross earnings tax a license tax in the Afro-American Insurance case, was the language of the act imposing it, the fact that it was imposed with the license tax of $100.00, and as a condition of issuing the license. The court laid particular stress upon the language of the act. The court said:

> "It will be observed that the Legislature intended the tax in question as a license tax, and so treated it. It will further be observed that in the paragraph so copied above a license tax of $200 is imposed upon certain specified in-

> surance companies, etc., and a license tax of $50, upon plate glass insurance companies, and that 'in addition thereto each of said companies shall' pay annually 'two per cent. of the gross amount of receipts from policy holders in this state,' which like amount is required of companies doing business under chapter 5459, Acts of 1905, to which class the defendant belongs."

It was required to be paid as a condition to issuing the license to do business. Such is not the case of the gross earnings tax. It is not called a license tax, and the gross earnings tax is imposed without any condition whatever. Let us briefly examine the other authorities upon this question.

The case of *City of Brookfield v. Tooey*, 43 S. W. 387, (Mo.), is practically on all-fours with the case at bar. That was an action against the defendant for failure to comply with the terms of an ordinance imposing a tax of one per cent per annum upon the cash value of goods, wares and merchandise on hand, as shown by a sworn statement, as and for a license tax. The court said:

> "Counsel rightly concludes that the vital and exceedingly important question presented in this record is the validity of the license tax of 1 per cent per annum upon the cash value of the goods, wares, and merchandise owned by the defendant as a merchant in said city. It will be observed that the defendant has paid all of his taxes, state, county and city, up to the constitutional limit, and that no question arises in regard to an election to increase the power of taxation. In a word, can this tax of 1 per cent, upon the cash value of the goods on hand be upheld as an occupation or privilege tax? After a careful investigation of the questions mooted and most ably discussed

by counsel, it seems palpable that this is a 'property tax,' pure and simple. It is an obvious misnomer to call it a 'tax upon occupation.' While cities of the third class may exact a license tax upon occupations or callings, the tax thus enacted must be upon the privilege itself, and not a plain ad valorem tax upon property as this ordinance levies. We are firmly convinced that this tax cannot be held to be other than a direct tax upon property. It is therefore in direct disobedience of sections 3 and 11 of article 10 of the constitution of Missouri, because it is not uniform upon all the personal property in said city, but levies $1 upon every $100 of assessable personal property belonging to a merchant, and exempts all personal property not belonging to a merchant from said tax; and, because having already taxed and collected of the merchants of said city 50 cents on the $100 valuation for said year, this additional ad valorem tax of 1 per cent on the same property is in excess of the constitutional limit, and therefore void. Whether the city can divide the merchants of a city into as many classes as their assessments differ in amounts, and denominate each merchant a separate class according to his valuation, and enact of each a different license tax, as this ordinance evidently proposes, we deem unnecessary to discuss at this time. It is sufficient to say the present tax is so plainly a property tax, and an effort to evade the constitution, that it is illegal and void."

This case is further strengthened by the holding of the Supreme Court of Missouri in the case of *The State ex rel Wyatt v. Ashbrook*, 154 Mo. 375. The court held that a tax on department stores, imposed as a license tax, lacked every element of a license tax, was a revenue measure, and was unconstitutional.

In the case of *State v. Canda Cattle Car Co.*, 85 Minn. 457, the statute authorized the imposition of a 2% tax upon the value of the property of cattle car companies assessed in the manner heretofore stated in this brief. It was imposed by the legislature "in the nature of an excise tax or license," but the court held that it was not such a tax, that it was a direct burden upon the property and as such lacked uniformity with other taxes, and was void. The court said:

> "The language of this act is that the state board of equalization shall impose a tax 'in the nature of an excise tax or license' but a reading of the whole act shows beyond any doubt that it was not the intention of the legislature that the tax should be a license fee imposed as a condition to the right of such corporations to do business in this state."

In the case of *Ellis v. Frazier*, 38 Ore., 462, 63 Pac., 642, certain counties imposed a tax of $1.25 upon bicycles, and provided that the same should be used for keeping up the highways in the district. In considering whether this was a tax or a license, the Supreme Court said:

> "As a preliminary matter it is important to consider whether the burden thus imposed upon bicycle owners is a tax or a license; for, if the latter, it is not inhibited by the provisions of the organic act relied upon, the courts generally holding that the constitutional requirement as to uniformity of taxation has no reference to the taxation of occupations. *Ex parte City Council of Montgomery*, 64 Ala. 463; *Ex parte Miranda*, 73 Cal. 365, 14 Pac. 888; *Baker v. City of Cincinnati*, 11 Ohio St. 534. The legislative assembly has referred to the levy as a tax, but the descriptive designation is unimportant;

for the object sought to be attained by the enactment must determine the character of the exaction. *Ex parte Gregory*, 54 Am. Rep. 516. 'The distinction between a demand of money under the police power, and one made under the power to tax,' says Judge Cooley, 'is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation, and the other for revenue. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case, and referring it to the proper power.' *Cooley, Tax'n*, 396. It was held, in the case of *In re Wan Yin* (D. C.) 22 Fed. 701, that whenever it is manifest that the fee for a license to conduct an occupation is substantially in excess of the sum necessary to cover the cost of issuing the license and the incidental expenses attending the regulation of the business, the burden is a tax, and not a license. So, too, in *City of St. Paul v. Traeger*, 25 Minn. 248, the common council of St. Paul having passed an ordinance requiring a license fee of $25.00 from every peddler of vegetables in the streets of the city, and no regulation or restraint having been imposed upon the manner of conducting the business, it was held that the exaction, being so much in excess of the reasonable expense of issuing the license, was a tax levied upon the business for revenue. 'It is therefore conclusive,' says Mr. Tiedeman, in his work on State and Federal Control of Persons and Property (volume 1, p. 495), in commenting upon the distinction between a tax and a license, "that the general requirement of a license, for the pursuit of any business that is not dangerous to the public, can only be justified as an exercise of the power of taxation, or the requirement of a compensation for the enjoyment of a privilege or franchise.'" (Page 643.)

In the case of *Youngblood v. Sexton*, 32 Mich. 408, Cooley, J., in defining the nature of a license tax, said:

> "The popular understanding of the word license undoubtedly is a permission to do something which without the license would not be allowable. This we are to suppose was the sense in which it was made use of in the constitution. But this is also the legal meaning. 'The object of a license,' says Mr. Justice Manning, 'is to confer a right that does not exist without a license.' *Chilvers v. People*, 11 Mich. 43, 49. Within this definition, a mere tax upon the traffic cannot be a license of the traffic, unless the tax confers some right to carry on the traffic which otherwise would not have existed. We do not understand that such is the case here. The very act which imposed this tax repealed the previous law, which forbade the traffic and declared it illegal. The trade then became lawful, whether taxed or not; and this law, in imposing the tax, did not declare the trade illegal in case the tax was not paid. So far as we can perceive, a failure to pay the tax no more renders the trade illegal than would a like failure of a farmer to pay the tax on his farm render its cultivation illegal. The state has imposed the tax in each case, and made such provision as has been deemed needful to insure its payment; but it has not seen fit to make the failure to pay a forfeiture of the right to pursue the calling. If the tax is paid, the traffic is lawful; but if not paid, the traffic is equally lawful. There is consequently nothing in the case that appears to be in the nature of a license. The state has provided for the taxation of a business which was found in existence, and the carrying on of which it no longer prohibits: and that is all." (Pgs. 419-420.)

In the case of *Commonwealth v. Standard Oil Co.*, 101 Pa. St. 119, a tax of a certain per cent was laid on the income or property of certain corporations; that is, a rate of tax upon the dividend made and declared by such companies, and if no dividend was made or declared, then three mills upon a valuation of the capital stock. It was claimed that this tax came within the definition of a license tax because it was imposed on corporations doing business within the state. The Supreme Court held to the contrary. Mr. Justice Paxson, writing the opinion, said:

> "A license tax is evidently intended as a compensation to the state for the protection which it affords foreign corporations who have an office within its borders for the convenience of its officers, but upon whose property it could impose no tax because not within its jurisdiction. The tax in this case is in no sense a license tax. The state never granted a license to the Standard Oil Company to do business here. It merely taxes its property, that is, its capital stock, to the extent that it brings such property within its borders in the transaction of its business." (Pgs. 145-146.)

In the case of *Pingree v. Auditor General*, 120 Mich. 95, 78 N. W. 1025, a tax was levied on telephone and telegraph lines, at a certain rate per cent upon the value of the property within the state. It was claimed that this was a privilege or license tax. The court said:

> "If the tax in this case is clearly an ad valorem tax, if it is a tax on property,—and this cannot be questioned, because the title and the act both call it a tax on telegraph lines, which are property,—there is nothing in the law

to indicate that an occupation tax or tax upon business was intended, even were we to hold that its ad valorem feature would not necessarily preclude its being denominated a specific tax." (Pg. 1027.)

In the case of *Pullman Southern Car Co. v. Noland*, 22 Fed. 277, Mr. Justice Matthews, writing the opinion of the court at circuit, held that the tax imposed in that case, $75 a car, for the privilege of running sleeping cars within the state, was a license tax. The language of the court in defining same is important. The court said:

"A reference to repeated decisions of the supreme court of Tennessee leaves no room to doubt what constitutes a 'privilege' as a subject of taxation, under the constitution and laws of that state. 'The first legislature, after the formation of the constitution,' said that court in *Veach v. Baker*, 4 Sneed, 113, 'acted upon the idea that every occupation which was not open to every citizen, but could only be exercised by a license from some constituted authority, was a privilege. And it is presumed that this is a correct definition of the term.' In *Mayor of Columbia v. Guest*, 3 Head, 414, the keeping of a livery stable was held not to be a privilege, because the legislature had not so declared it. 'A privilege,' said the court, in *Jenkins v. Ervin*, 8 Heisk. 456, 'is the exercise of an occupation or business which requires a license from some proper authority, designated by some general law, and not free to all, or any, without such license.' 'There is a clear distinction recognized,' says the Supreme Court of Georgia, in *Home Ins. Co. v. Augusta*, 50 Ga. 530, 'between a license granted or required as a condition precedent before a certain thing can be done and a tax assessed on the business which

> that license may authorize one to engage in. A license is a right granted by some competent authority to do an act which, without such authority, would be illegal. A tax is a rate or sum of money assessed upon the person, property, business, or occupation of the citizen.'" (Page 279.)

In the case of *City of Burlington v. The Putnam Insurance Co.*, 31 Ia., 103, the validity of a 1% tax upon the premiums of insurance companies was involved. The law of the state authorized a city council "to levy and collect taxes on all real and personal property in said city not exempt by the general law from taxation;" and also "to grant or refuse licenses to insurance companies."

It provided for issuing a license and collecting therefor such a sum as the council should from time to time declare. By a subsequent resolution the city council imposed a charge or tax of 1% on the premiums of all insurance companies in addition to the license theretofore imposed. The court held that the latter was not a license tax and not a tax on real and personal property, and was therefore in violation of the law of the state. The court said:

> "It cannot be fairly claimed that the one per centum is a charge for license. The resolution authorizing the collection of that sum expressly distinguishes the two. It in terms requires the payment of the one per centum, and then declares that there shall be collected 'in addition thereto the following sums for licenses,' specifying the amounts to be paid. The one per centum is clearly not required to be paid for or on account of the license. It is, then, an assessment in the nature of a tax. Is the city authorized to levy it? It may levy and collect

> taxes upon the real and personal property in the city, and this is the extent of its taxing power. It is a well settled rule that taxes can be levied and collected by municipal corporations only, as the power is conferred upon them by the legislature; from that source they derive authority to levy taxes, and it must be exercised in the manner prescribed in their charters. The power conferred in this instance is to levy and collect taxes upon real and personal property." (Page 104.)

In the case of *Home Insurance Co., of New York v. City Council of Augusta, Georgia*, 50 Ga. 530, it appears that the Home Insurance Co. was authorized to do business in the state under the Insurance Act. The City Council of Augusta passed an ordinance to assess and levy taxes for the support of the municipal government, and purported to make it an annual license tax of $100.00 on one class of insurance companies, and $250.00 on another. The court held that it was not a license. The discussion of the case is particularly applicable to the question at bar. The court said:

> "There is a clear distinction recognized between a license granted or required as a condition precedent before a certain thing can be done, and a tax assessed on the business which that license may authorize one to engage in: 42 Georgia, 596. A license is a right granted by some competent authority to do an act which, without such license, would be illegal. A tax is a rate or sum of money assessed on the person, property, etc., of the citizen: Bouv. L. D.: 36 Georgia, 460. A license is issued under the police power of the authority which grants it. If the fee required for the license is intended for revenue, its exaction is an exer-

cise of the power of taxation; Cooley's Const. Lim. 201. The tax assessed upon complainant by the City Council of Augusta by the ordinance of January 5th, 1874, although called a 'license tax,' is more properly a tax than a license fee, or a fee exacted in order to secure the right to engage in a business which, without paying for and obtaining such authority, would be illegal. The title of the ordinance is, 'An ordinance to amend an ordinance to assess and levy taxes for the support of the municipal government of Augusta,' etc. The amended ordinance has these further words in its title, 'and for the payment of the interest on the funded debt of said city.' It is true, this last mentioned ordinance, which is so amended, refers to the 'subjects and rates of taxation and license;' but by referring to the ordinance of December 28th, 1872, entitled 'An ordinance to fix the annual and specific taxes of the city of Augusta,' etc. and which was continued in force by said amended ordinance, it will be seen that there was a special tax of $100.00 assessed upon such companies as that of complainants. This is the first ordinance, so far as the record shows, assessing such a tax. In that ordinance, both in the title and the enacting clause, it is called a tax. In the second and third sections, it may be that a license is provided for in the cases of two classes of business, and in those sections they are denominated licenses; but the assessment made by it on insurance companies is clearly a tax." (Pages 537-8.)

In the case of the *Attorney General v. Winnebago Lake & Fox River Plank Road Co.*, 11 Wis., 35, the legislature levied a tax of 1% upon the gross earnings of the company. It was held that it was not a license tax. On this question, the court said:

> "The only other position taken was that this should be regarded as a sum paid for a license. But we are wholly unable to see how this can be maintained. It does not purport to be a license, it is not classed among licenses, various kinds of which are provided for in the statutes. It does not perform the functions of a license. A license is an authority granted to do that which the licensee might not legally do without it." (P. 44.)

There are two other cases which should be called to the attention of the court, the *Galveston, Harrisburg, etc., R'y Co. v. Texas*, decided in the Civil Court of Appeals, 93 S. W. Rep. pg. 436, and in this court on a writ of error to the Supreme Court of Texas. It is unnecessary to state the facts in this case, as the decision is familiar to everyone. Suffice it to say that the tax was upon the gross earnings of a Texas railroad in addition to an ad valorem tax. The Court of Civil Appeals in a very carefully considered opinion too long to quote in this brief, on pages 444 to 448, held that this was a tax on property and not an occupation tax, that this holding was principally based upon the nature of the tax and the construction of the various statutes imposing it. The court said:

> "If the tax is upon the gross receipts it is upon property, and it could not in such a case, be used as a mere measurement to ascertain the amount of the occupation tax."

This court, in holding the law unconstitutional, said:

> "This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax." (210 U. S. pg. 228.)

In the case of *Parker, Tax Collector v. North British & M. Ins. Co.*, 42 La. Ann. 428, 7 So. 599, the legislature imposed a gross earnings tax upon the receipts of certain insurance companies. Under the constitution of Louisiana only two kinds of taxes could be levied, property taxes and license taxes, and the question was whether this was a license tax. The court said:

> "The tax is resisted on the ground that it is without warrant under the constitution and laws of the state. The constitution contemplates only two kinds of taxes, viz.: property taxes and license taxes. We are not prepared or required to say whether such a tax, if imposed, in proper terms, as a license tax, would be valid. It is not, and does not purport to be, a license tax. A license tax is not covered or contemplated by either the title or body of the act. The very proceeding taken by the state is one provided exclusively for the collection of property taxes; and under the terms of the pleadings, as well as under the assessment itself, it is claimed and denominated as a tax on property.
>
> Then the question, simply stated, is whether a property tax levied on the gross receipts of a limited and particular class of persons, and not levied upon the gross receipts of any other class, is valid. The plain constitutional mandate that 'all property shall be taxed in proportion to its value' would seem peremptorily to settle this question. If gross receipts be property subject to taxation, the gross receipts of all or of none must be taxed. It is vain to call gross receipts 'capital.' They are not capital or capital stock, and no legislative declaration can make them so. The only class of taxes under which this can possibly fall is that of an income tax." (Page 600.)

In the case of *State v. Express Co.*, 60 N. H. pg. 233 of the opinion, the court held a gross earnings tax upon express companies not to be a license tax. The court said:

> "This case requires us to decide upon the constitutionality of c. 63, Gen. Laws. Whether under any circumstances, the statute in question could be regarded as an exercise of the police power, we need not inquire. It is obvious it was not so intended or understood, either by the tax commissioners who reported it, or the legislature by which it was enacted, or the commissioners under whose direction it was incorporated with the statutes in the volume of the General Laws. The report of the tax commissioners affords abundant evidence of their understanding that it was a statute solely for raising revenue. They speak of taxes to be raised from 'express companies' as a new source of revenue, as one of the subjects of taxation. Report of Tax Com., 23, 24, 25. The title of the bill, as reported by them, was 'An act to tax express corporations, companies or persons carrying on express business in this state;' and the bill itself, as enacted, is identical with that reported by the commissioners, with the exception that, as enacted, there was an additional section providing for the collection of the tax, and 'license' was substituted for 'tax' wherever that word occurred in the bill as reported, as though the name or title of the imposition was called would determine its nature. In the General Laws it is placed under the general title 'Of taxation,' and the title of this particular act is 'Taxation or the licensing of express companies and express men.' The word 'license' may have been substituted under the impression that, as an act imposing a tax, it could not be defended; and other reasons not now necessary to be mentioned, may have

led to the change;—but whatever may have been the object, and without considering the title of the act, either as reported or passed, or its particular title and location in the General Laws, in the light of all the surrounding circumstances, and having in mind the provisions of the act, the character of the business upon which it was designed to operate, and the nature, application, and extent of the police power, it can be considered in no other light than that of a statute the object of which is to raise revenue by taxation, and the question before us must be determined on this view of its scope and object." (Pages 233-234.)

The act in question contains absolutely none of the elements of a license tax thus defined by the courts. As we have seen, Chapter 5596, Laws of Florida 1907, containing section 47, imposing the gross earnings tax, is entitled,

"AN ACT RELATING TO TAX ASSESSMENTS AND COLLECTION OF REVENUE."

The object of every provision of the act is for the levying of direct taxes and the collection of the same as revenue for the state. The particular section simply requires a report of the gross revenue within the state, requires the comptroller to estimate the same if it is not reported, and in such a case to add 10% as a penalty for failure to report, and to proceed to collect the tax together with all costs and penalties, the same as other delinquent taxes are collected. There is no power to exclude the company from the state. The company has no greater right to do business after the payment of the tax than it had before; no privilege is granted by the act or obtained by the payment. Its position in the statutes, and its language, plainly indicate that it is the imposition of a direct

revenue tax. The object in passing it was clearly to raise revenue. It had been a part of the general taxation revenue law for years. It had been paid by the company because during that time the company was not subject to an ad valorem tax in addition to the gross earnings tax. In 1907 the legislature provided for the taxation of its property the same as railroads, to-wit, on a cash valuation under the uniform rate applied to all other property, so that it now pays a tax on all its property, a tax on the gross earnings of all its property, and a license tax for running each car in the state. It is a rank discrimination as between it and railroads running their own sleeping and parlor cars (as we are informed the East Coast Railroad does), as well as a discrimination against it in favor of other property. It is a clear violation of the constitution and should not be sustained.

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APPENDIX.

Chapter 5459, Laws of Florida, 1905, is an act entitled,

> An act to define sick and funeral benefit insurance, to limit the amount of risks to be taken, and to prescribe the terms on which sick and funeral benefit companies, or corporations, and life insurance companies, or corporations, may engage in the business of sick and funeral benefit insurance in this state; to provide penalties for violation thereof, and to repeal chapter 5222, acts of 1903, Laws of Florida.

The act contains various requirements as to capitalization of corporations engaging in such business, reports to be made to State officials, investigations to be made by the officials, the issuing of certificates of authority to do business, and then the following requirement.

> Sec. 7. Each company, corporation or association doing business under the provisions of this act shall pay annually to the State Treasurer, for the privilege of transacting business in this State, one hundred dollars as a license tax, and two dollars for each local agent, and ten dollars for each traveling agent, and a fee of five dollars for each annual statement filed: provided that life insurance companies receiving the certificate of authority in accordance with the provisions of Section 2 of this act, which shall have paid the license tax required of such company in conducting life insurance in this State, shall not be required to pay the license tax herein provided for.

Chapters 5596 and 5597, Laws of Florida, 1907, are very comprehensive enactments, covering generally the subject of taxation and taking the place of most of the previous legislation on that subject. Chapter 5596 is entitled,—

"AN ACT RELATING TO TAX ASSESSMENTS AND COLLECTION OF REVENUE."

It seems to be intended to embrace generally the field of ad valorem taxation, and it also contains a section subjecting sleeping and parlor car companies to a gross earnings tax. The following is an abstract of some of the provisions of the act, matter in single space being taken from the act verbatim:

> Section 1. That all real and personal property in this State, and all personal property belonging to persons residing in this State, not hereby expressly exempted therefrom, shall be subject to taxation in the manner provided by law.
>
> * * * * *
>
> Sec. 8. The owner or holder of stock in any incorporated company doing business under incorporated name shall not be taxed for such stock; Provided, that such stock is returned for taxation by such incorporated company and taxes are paid thereon by such company, or the property of said corporation is assessed for taxes where located and taxes are then paid on such property. * * *
>
> * * * * *

Sections 1 to 45 inclusive provide a general system for a uniform ad valorem tax on all real and personal property, and also for a poll tax on individuals. These sections prescribe the methods by which the taxes are to be assessed, levied, collected and enforced, and the

duties of the various county and state officers in connection therewith. They also provide for the exemption from taxation of certain property, and that all other property, real and personal, shall be taxed as therein provided.

Sec. 40. The President and Secretary, or Superintendent or Manager of any railroad company or street railroad company *or sleeping or parlor car company*, or the receiver thereof, whose car, track or roadbed, or any part thereof is in this state, shall annually, on or before the first Monday in March, return to the Comptroller of the State, under their oath, the total length of such railroad, the total length and value of such main track, branch, switch and spur track, and side track, lots or parts of lots not leased or rented, and terminal facilities, in this State, and the total length and value thereof in each county, city or incorporated town in this State, as of the first day of January. They shall also make return of the number and value of all locomotives, engines, passenger, *sleeping*, freight, *parlor*, platform, construction and other cars and appurtenances, and should any such company or its officers fail to make the returns required by this act on or before the first Monday in March, *when such returns are made, or should any such returns not be made*, or should the Comptroller have reason to believe that any return so made does not give the complete and correct value of such railroad property, it is hereby made the duty of the Comptroller, Attorney General and State Treasurer, *after having given not less than five days' notice to the person or persons making the return of the time and place of hearing*, to assess the same from the best information they can obtain, specifying the value thereof in each county; and the value of the locomotives, engines, passenger, *sleeping, parlor*, freight, platform, construction

and other cars and appurtenances shall be apportioned by the Comptroller pro rata to each mile of main track, branch, switch, spur track, and side track, and the Comptroller shall notify the County Assessor of Taxes of each County through which such railroad runs of the number of miles of track and the value thereof, and the proportionate value of the personal property taxable in their respective counties, and he shall notify each incorporated city and town in which said railroad runs of the mileage, apportionment of rolling stock, and other property of said railroad within such city or town, and the value thereof shall be assessed by such city or town, as provided by law, and upon the value thus ascertained and apportioned, taxes shall be assessed the same as upon the property of individuals. *That every telegraph line in this State shall be returned and assessed in the manner as is provided by this act for the assessment of railroads, and in case of failure to pay the taxes assessed, the entire line of telegraphs in this State and all of its properties, rights and franchises, or any property belonging to the same company, person or persons, may be sold in the same manner as is provided for the sale of the railroads or any of its property upon which any tax shall be due and not paid.*

The above quoted Section 30 is an amendment of Section 540 of the General Statutes of the State of Florida, 1906, which is said to be a re-enactment of Chapter 4514, Acts 1897, amending Chapter 4322, Acts 1895, and the matter italicized above is added to the law as it stood in 1906 by the Act of 1907.

Sec. 47. All sleeping and parlor car companies operating their cars in this state shall, on or before the first day of January, 1908, and annually thereafter, report to the Comptroller

> of the State of Florida, under oath of the Secretary or other officer of such company, the total amounts of their gross receipts derived from business done between points in this State; and at the same time shall pay into the State treasury the sum of one dollar and fifty cents upon each one hundred dollars of such gross receipts, and if any such company shall fail to make such report to the Comptroller and pay the tax thereon as herein provided, the Comptroller shall estimate the amount of such gross receipts from such information as he may be able to obtain, and shall add ten per cent to the amount of such taxes as a penalty for the failure of such company to make reports, and shall proceed to collect such tax, together with all costs and penalties thereon, the same as other delinquent taxes are collected.

Sections 48 to 65 inclusive provide for the collection of unpaid taxes on railroad property and real estate, and for compensation to the county officials charged with the duty of administering the law.

Section 59 gives authority to tax collector of any city or incorporated town to sell property or railroad or telegraph companies for non-payment of taxes, and then continues,

> Nothing in this act shall be so construed as in any way abridging or limiting powers to assess, levy or collect taxes, licenses or assessments which have been or may be granted to any municipal corporation by special act or charter act, or as limiting such municipal corporation in the method of assessing, levying or collecting the same, to the methods established by this act.

There are many provisions in the act which provide

for the administration and collection of ad valorem taxes, and for sale of property for non-payment of taxes.

The act was approved June 18, 1907, and it provides that it shall go into effect upon its passage.

Chapter 5597, Laws of Florida, 1907, is an act entitled,

AN ACT IMPOSING LICENSES AND OTHER TAXES, PROVIDING FOR THE PAYMENT THEREOF, AND PRESCRIBING PENALTIES FOR DOING BUSINESS WITHOUT A LICENSE, OR OTHER FAILURE TO COMPLY WITH THE PROVISIONS THEREOF.

Section 1. No person, firm or corporation shall engage in or manage the business, profession or occupation mentioned in this act unless a State license shall have been procured from the tax collector of the county wherein the place of business may be located, or State Treasurer, which license shall be issued to each person, firm or corporation on receipt of the amount hereinafter provided, together with the County Judge's fee of twenty-five cents for each license countersigned by him, and shall be signed by the tax collector and the County Judge, and shall have the County Judge's seal thereon. Every word importing the singular number only, may extend to and embrace the plural number, and every word importing the plural number may be applied and limited to the singular number, and every word importing the masculine gender only, may extend to and apply to females as well as males. Whenever the word oath is used in this act, it may be held to mean affirmation, and the word swear in this act shall be held to include affirm

Sec. 2. Counties and incorporated cities and towns may impose such further taxes of the same kind upon the same subjects as they may deem proper, unless otherwise provided in this act, when the business, profession or occupation shall be engaged in within such county, city or town. The tax imposed by such county, city or town shall not exceed fifty per cent of the State tax. But such county, city or town may impose taxes on any business, profession or occupation not mentioned in this act, when engaged in or managed within such county, city or town.

Section 3 provides for the terms for which licenses may be issued, and for licenses for a fraction of a year, for transfer of licenses on a bona fide transfer of property used in the business for the transaction of which the license is paid.

Sec. 5. That the following enumerated individual license taxes shall be paid to the State by the persons engaging in, managing or transacting the several occupations or professions named, to-wit:

SCHEDULE A.

Then follows a long schedule of various occupations and the taxes payable by each.

Sections 6 and 7 relate to licenses for the sale and manufacture of intoxicating liquors.

Section 8 starts out with an exemption in favor of manufacturers of domestic wines, and then follows this paragraph, as a part of section 8:

The owners, managers or agents of each of the following enumerated institutions, establishments, appliances and apparatus for the transaction of business or entertainment or ac-

commodation of the public for profit shall pay the State license taxes set opposite their respective designations or definitions in Schedule B below, to-wit:

SCHEDULE B.

Here follows a long enumeration, alphabetically arranged, of brokers, bankers, barbers, etc.—all still a part of Section 8 of the act, and then comes the following:

"That each insurance company or association, firm or individual doing business in this State * * * shall pay to the State Treasurer a license tax of $200 * * *; and in addition thereto each of said companies shall, upon the 1st day of January after the passage of this act, and on the first day of each succeeding January thereafter, pay to the State Treasurer two per cent of the gross amount of receipts of premiums from policy holders in this State.

Companies or associations doing business under Chapter 5459, Laws of Florida acts of 1905, shall pay to the State Treasurer two per cent of the gross amount of receipts from policy holders in this State. * * *

That each insurance company shall pay to the State Treasurer for each traveling agent or solicitor doing business in this State a license tax of twenty-five dollars.

* * * * *

Job printing offices, running by power, five dollars.

Laundries, steam, ten dollars.

* * * * *

Sleeping and parlor cars, twenty-five dollars for each car.

With buffet, forty dollars for each car.

Dining cars, twenty dollars each.

Street shows, performances or carnivals—for each tent or other structure and for each day, five dollars.

* * * * *

Any train conductor, or any conductor of any sleeping car, parlor, buffet or dining car, who hauls or operates any such car within this State without such license, or who fails or refuses to exhibit such license when required by any collector of revenue in any county in this State, shall be guilty of a misdemeanor, and shall be punished therefor by a fine of not more than five hundred dollars, or by imprisonment for not more than sixty days for each offense.

All steamboats or steam ferries * * * shall pay a license tax of fifty dollars * * *.

* * * * *

Telegraph systems * * * shall pay a license tax to the Comptroller of fifty cents per mile.

Section 8 of the act concludes with requirement of license taxes from gas and electric light works.

Section 10 requires authenticated reports where amount of license tax is to be computed on basis of capitalization of corporations or on value of property used in the business.

Sec. 11. Any person or persons, firm or corporation or association that shall carry on or conduct any business or profession for which a license is required, by either this or any other act, without first obtaining such license, shall, except in such cases as are otherwise provided by law, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than double the amount required for such license. The payment of all license taxes shall be enforced by the seizure and sale of the property by the collector; or in case of State license taxes payable either to the State Treasurer or

the Comptroller, by the State Treasurer or the Comptroller, as the case may be * * *.

Section 12 to 15 inclusive contain various provisions for the administration and enforcement of the taxes levied by the act.

Sec. 16. That nothing in this act shall be construed as in any way abridging or limiting the powers which have been granted or may be granted to any municipal corporation, by special act or charter act, for the purpose of requiring the payment of license taxes.

Sec. 17. That all laws and parts of laws in conflict with the provisions of this act are hereby repealed; but nothing in this act contained shall be held to repeal an act passed at the present session, entitled "An act to impose license taxes on railroad companies."

The act was approved June 1, 1907.

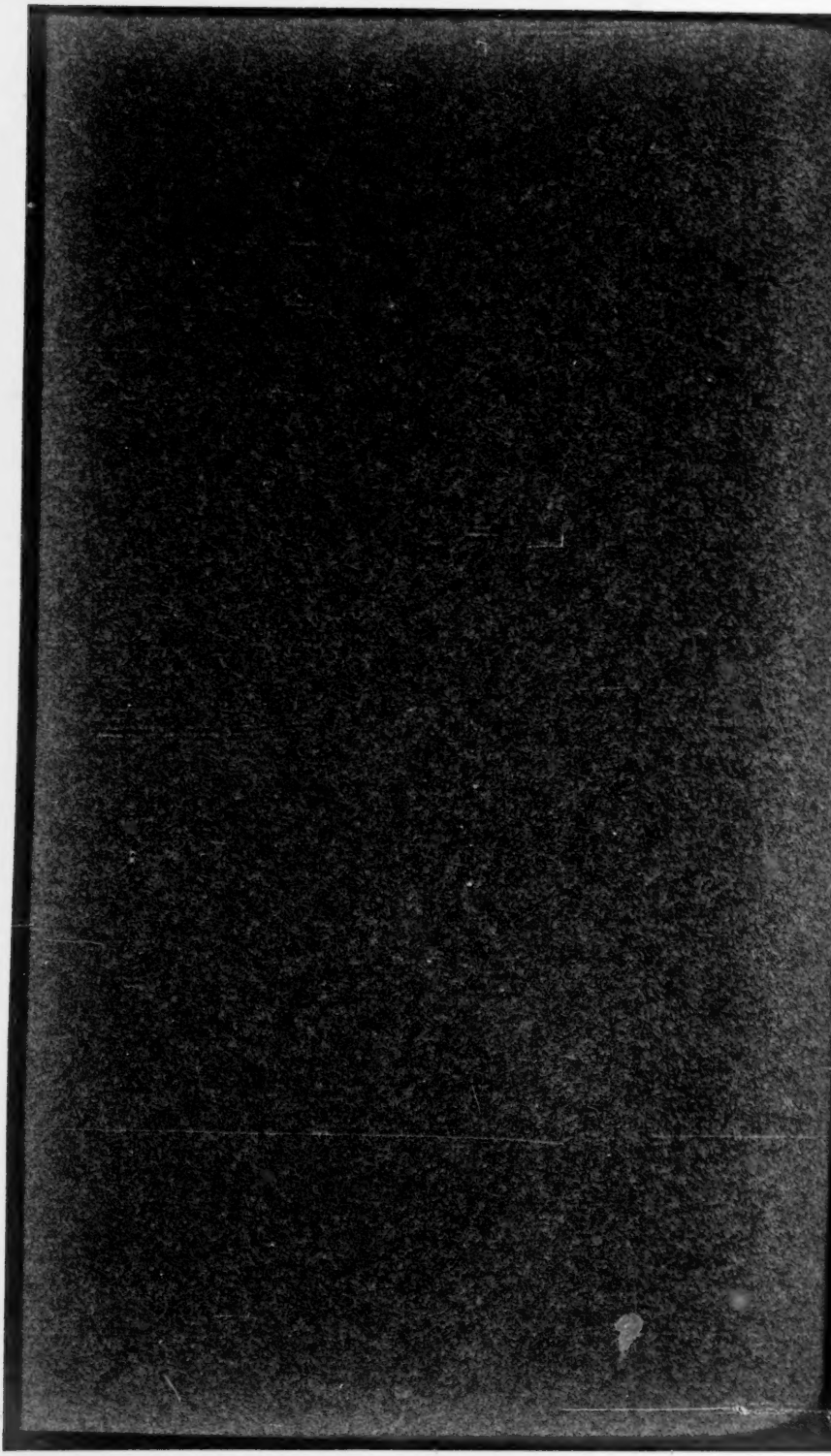
There was a revision and consolidation of the Florida laws under date of 1906, which is known as the "General Statutes of the State of Florida, 1906." Title VI of this Code is entitled "Taxation and Finances." The first sections of the chapter deal with definitions and exemptions and general taxation of specific tangible property. Then come sections providing for license taxes on various occupations and professions. The list of occupations taxes is quite broad, but not so broad as the 1907 act. Then follow sections dealing further with ad valorem taxation.

Section 549, which is said to be taken from ch. 4515 acts 1897, sec. 8, amending sec. 47 ch. 4322, acts 1895, relates to assessment and taxation of railroad property, and is substantially identical with Sec.

46, ch. 5596, acts 1907, heretofore quoted with the underscored matter omitted.

> Sec. 550. Every telegraph line in this state, and its properties, rights, franchises, of every kind in this State, shall be returned and assessed in the same manner as is provided in this chapter for the assessment of railroads * * *.
>
> * * * * *
>
> Sec. 553. (ch. 4515, acts 1807, § 8.) All sleeping and parlor car companies operating their cars in this State shall annually, on or before the first day of January, report under oath of the Secretary or other officer of such company, the total amount of their gross receipts derived from business done between points in this State, and at the same time shall pay into the State treasury the sum of one dollar and fifty cents upon each one hundred dollars of such gross receipts; and if any such company shall fail to make such report and to pay the tax thereon as herein provided, the Comptroller shall estimate the amount of such gross receipts from such information as he may be able to obtain, and shall add ten per cent to the amount of such taxes as a penalty for the failure of such company to make report, and shall proceed to collect such taxes, together with all costs and penalties thereon, the same as other delinquent taxes are collected.

[redacted]



Supreme Court of the United States

OCTOBER TERM, 1911.

No. 545.

THE PULLMAN COMPANY, APPELLANT,

vs.

A. C. CROOM, COMPTROLLER OF THE STATE OF FLORIDA, APPELLEE.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

The appellant on January 3rd, 1911, filed in the United States Circuit Court for the Northern District of Florida, its bill of complaint, praying that an injunction be granted restraining the appellee from collecting from said appellant by levy or otherwise that certain license tax imposed by the provisions of Section 47 of Chapter 5596 of the Laws of Florida, which is as follows:

"Sec. 47. All sleeping and parlor car companies operating their cars in this State shall, on or before the first day of January, 1908, and annually thereafter, report to the Comptroller of the State of Florida, under oath of the Secretary or other officer of such company, the total amounts of their gross receipts derived from

business done between points in the State; and at the same time shall pay into the State Treasury the sum of one dollar and fifty cents upon each one hundred dollars of such gross receipts, and if any such company shall fail to make such report to the Comptroller and pay the tax thereon as herein provided, the Comptroller shall estimate the amount of such gross receipts from such information as he may be able to obtain, and shall add ten per cent. to the amount of such taxes as a penalty for the failure of such company to make report, and shall proceed to collect such tax, together with all costs and penalties thereon, the same as other delinquent taxes are collected."

On February 9th, 1911, appellant's application for an injunction pendente lite was heard in New Orleans by U. S. Circuit Judges Don A. Pardee, A. P. McCormick, and David D. Shelby.

On February 11th, 1911, the following order was made upon appellant's application for an injunction pendete lite, to wit:—

"This cause came on to be heard upon an application for an injunction pendente lite before Don A. Pardee, A. P. McCormick and D. D. Shelby, Circuit Judges, sitting in Chambers in the City of New Orleans and was argued upon bill and affidavits by John E. Hartridge, Esq., for the Complainant and the Hon. Park Trammell, Attorney General of the State of Florida, for defendant:

Whereupon, and on due consideration, the said judges being of the opinion that Section 47, Chapter 5596 of the Laws of Florida, approved June 18th, 1907, taken in connection with Chapter 5597 of the Laws of Florida, approved the same day, provides for a graded license tax on all sleeping and parlor car companies operating their cars in the State of Florida, and is within legislative power of the State; and, further, that the said complaint can have no standing in equity to resist the tax levied under said law until it shall have made the return pro-

vided for therein and paid the taxes thereon, the said application is denied."

"New Orleans, La., February 11th, 1911.

DON. A. PARDEE,
Circuit Judge.
A. P. McCORMICK,
Circuit Judge.
DAVID D. SHELBY,
Circuit Judge."

Thereafter on February 28th, 1911, the appellant entered its appeal to the Supreme Court of the United States for review of the order made herein by the lower court.

ARGUMENT AND AUTHORITIES.

First Assignment.

The first assignment of error made by appellant, as appears on page 28 of the Record is as follows:

"The court erred in deciding and denying an interlocutory injunction to the plaintiff as prayed in the bill of complaint."

In answer to this assignment we take the position that appellant's bill of complaint failed to make out a case entitling it to the relief sought, and therefore the court below did not err as appellant alleges in the said assignment.

The appellant here and the complainant below in its bill of complaint attacks the tax authorized by said Section 47 of Chapter 5596 of the Laws of Florida upon the following grounds, to wit:

1st. That the said tax of one dollar and fifty cents upon every one hundred dollars of gross receipts derived from business done between points in this State is not

authorized by and does not find any warrant in any of the sections of the Florida Constitution.

2nd. That the statute authorizing said tax is invalid and void, because if enforced would take the appellant's proper without due process of law.

3rd. That there is no provision of law for a hearing before the issuance of a warrant by the Comptroller to collect said tax provided for in said Section 47 of Chapter 5596, or after the issuance thereof.

These constitute the main points of attack upon the law providing for the tax.

THE TAX AUTHORIZED.

The tax imposed by said Section 47 of Chapter 5596 is a graded *license tax* and is authorizd specifically by the following provisions of the Florida Constitution to wit:

"ARTICLE IX."

"Section 5. The legislature may also provide for levying a special capitation tax, and a tax on licenses."

The Florida court has passed upon statutes with similar provisions imposing a gross receipt tax. The latest case being that of the Afro-American Industrial and Benefit Association vs. State, 61 Fla. 85; 54 South. Rep. 383. In this case the court sustained a statute requiring the payment of two per centum annually upon the gross receipts of insurance companies. This license tax being required in addition to other license taxes upon the same companies.

Afro-American Industrial and Benefit Association vs. State, 61 Fla. 85; 54 South. Rep. 383.
Johnson vs. Armour, 31 Fla. 413.

The Florida court has held that there is no constitu-

tional limitation upon the right of the State to impose a license or occupation tax.

Hardee vs. State, 56 Fla. 378.

The said Section 47 of Chapter 5596 of the Laws of Florida, approved June 18th, 1907, taken in connection with and construed with Chapter 5597 of the Laws of Florida, approved the same day, being "AN ACT Imposing Licenses and Other Taxes, Providing for the Payment Thereof, and Prescribing Penalties for Doing Business Without a License, or Other Failure to Comply with the Provisions Thereof," provides for a graded license tax.

GROSS RECEIPT TAX VALID.

A tax based upon the gross receipts has uniformally been held to be valid and is held by the courts to be a license tax, occupation tax or excise tax, but never held to be an ad valorem or property tax.

Judson on Taxation, Sec. 226.
Rotterdam vs. Western Union Tel. Co., 127 U. S. 417.
Brown vs. Kentucky, 217 U. S. 563.
Maine vs. Grand Trunk Ry. Co., 142 U. S. 217, 227, 230.
Holmes Ins. Co. vs. New York, 134 U. S. 604.
Postal Tel. Cable Co. vs. Adams, 155 U. S. 688.
Pacific Exp. Co. vs. Seibert, 142 U. S. 339, 341.
Erie R. R. vs. Penn., 158 U. S. 431.

TAXPAYER ALLOWED A HEARING.

The said Section 47 of Chapter 5596 does allow a hearing, as the provisions thereof specifically provide for the companies to make a report of the gross receipts and it is upon the amount of gross receipts as reported by the company upon which the license tax of one dollar

and fifty cents per hundred is collected. See Section 47 of Chapter 5596, of Record, p. 2.

Gallup vs. Schmidt, 183 U. S. 300-307.
Kentucky R. R. Tax Cases, 115 U. S. 339-341.

HEARING NOT REQUIRED.

To make the law constitutional, no hearing is required in license taxes, that is where the amount is fixed.

Judson on Taxation, Sec. 319.

HEARING NOT NECESSARY WHEN VALUE FIXED BY TAXPAYER.

The courts hold that a hearing is not necessary where taxpayer fixes the value or amount upon which the fixed sum per hundred is collected.

Judson on Taxation, Sec. 320.
Peoples Nat. Bank vs. Marye, 107 Fed. 570.
Peoples Nat. Bank vs. Marye, 191 U. S. 272.

The last two named cases are directly in point and the questions there considered were very similar to those in the instant case.

NO RIGHT TO EQUITABLE RELIEF UNLESS TAXPAYER PERFORMS HIS DUTY.

These cases fully sustain the position that the company must comply with the statute and perform the duty required of it before it has any standing in a court of equity. It must do equity before seeking equity.

Peoples Nat. Bank v. Marye, 107 Fed. 570.
Peoples Nat. Bank v. Marye, 191 U. S. 272.

UNITED STATES COURT NO JURISDICTION TO ENJOIN.

Judson on Taxation, Section 530, says:

"The rule is well established in the Federal Courts and generally in the State Courts, that a tax will not be enjoined solely on the ground of unconstitutionality. The general rule that relief in equity can only be sought in the absence of an adequate remedy at law is reinforced in the Federal Courts by the provisions of the United States statutes. 'Although this statute is only declaratory of what was always the law, it must at least,' said the Supreme Court, 'have been intended to emphasize the rule and to impress it upon the attention of the courts.'

"It is also provided by another section of the United States statutes, that the writ of injunction shall not issue against any State Court except in relation to bankruptcy proceedings. The rule is also emphasized by still another provision of the Statutes that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' This last statute, however, applies only to taxes levied by the United States and is to be considered in connection with the provisions of the Internal Revenue law."

"It was said, however, by Justice MILLER with reference to this last provision, 'Though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared, if courts of justice could in any case, interfere with the process of collecting the taxes on which the government depends for its continual existence.' It is a wise policy."

The law as recited by Judson is supported by the court decisions generally:

Foster on Federal Practice, Vol. 1, 133.
Bates on Fed. Practice, Vol. 1, 553.
Allen vs. Pullman Palace Car Co., 139, U. S. 658.
Shelton v. Platt, 139 U. S. 591.
Joyce on Injunction, Vol. 2, Sec. 1189.

United States Tel. Co. v. Grant, 32 N. E. 1005.
High on Injunctions, Vol. 1, Sec. 505.
Baldwin v. Tucker, 16 Fla. 258.
Odlin v. Woodruff, 31 Fla. 160.
Peoples Nat. Bank of Lynchburg vs. Marye, 107. Fed. Rep. 570.
Pittsburg, etc. Ry. Co. vs. Board of Public Works, 172 U. S. 32.
Arkansas Bldg. Ass'n vs. Madden, 175 U. S. 273.
Stanley vs. Supervisors of Albany, 121 U. S. 536.
Swift & Co. vs. U. S., 111 U. S. 22.
21 Cyc. p. 820.

In the case of Allen vs. Pullman Palace Car Co. 139. U. S. 658, the court says:

"Purely injunction bills can not be maintained to restrain the collection of taxes upon sole ground of their unconstitutionality."

"When in a suit in equity this court finds on examination of the proofs, nothing which makes a proper case for equity, it is its duty to recognize the fact and give effect though not raised by the pleadings nor suggested by counsel.

DOES NOT SHOW BY BILL IRREPARABLE INJURY

It is not sufficient to simply allege that the complainant has no adequate remedy at law and that his damage will be irreparable. He must state facts in his bill to enable the court to determine whether or not his alleged injury will be irreparable.

Indian River Steamboat Co. vs. East Coast Transportation Co., 28 Fla. 387, 10 South. 48.
Town of Orange City vs. Thayer, 45 Fla. 34 South. 573.
Beach on Injunctions, Sec. 34.
Metcalf Co. vs. Martin, 54 Fla. 531.
Shelton vs. Platt, 139 U. S. 591.
Allen vs. Pullman Palace Car Co., 139 U. S. 658.

NO EQUITY IN BILL—LAW REMEDY.

A levy upon personal property under an unconstitutional law would be a void act, therefore a trespass, and party aggrieved would have his remedy at law.

High on Injunction, Vol. 1, Sec. 505.
Baldwin vs. Tucker, 16 Fla. 258.
Fla. Packing Ice Co. v. Carney, 51 Fla. 190.
Davison vs. N. C., 96 U. S. 106.
Joyce on Injunction, Vol. 2, Sec. 1189.

"A Federal court will not enjoin the collection of a tax which is only a personal charge against the party taxed, or charge upon his personal property."

Linehon Ry. Trans. Co. vs. Pendergross, 70 Fed. 1.

Second and Third Assignment.

The appellant's scond assignment is that "The court erred in deciding and holding that the plaintiff had no standing in equity to resist the tax levied and against which relief was sought until plaintiff should have made a return and paid the tax as requird by the statute contended to be unconstitutional."

The appellant's Third Assignment is "That the court erred in and by the order made herein denying the interlocutory injunction dated February 11th, 1911."

The argument made and authorities cited in opposition to the first assignment, apply as well to the Second and Third Assignments.

NO ABUSE OF DISCRETION BY LOWER COURT.

It is submitted that the appellant has failed to make out a case showing any abuse of the discretion vested in the lower court in passing upon the application for an interlocutory injunction, and that it is necessary to make

such showing in order to procure a reversal of the lower court.

Street Fed. Equity Practice, Vol. 3, Sec. 2386.
Vogel vs. Warsing, 146 Fed. 949-953.

CONCLUSION.

It is respectfully submitted that the record discloses no error; that the bill of complaint alleges no matters or things entitling complainant to the relief sought, and that the lower court is sustained by both the law and the equity practice in making its order of February 11th, 1911, denying the complainant an interlocutory injunction.

Respectfully submitted,

PARK TRAMMELL,
Attorney General, Solicitor
for Appellee.

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1941

No. [illegible] 28.

THE PULLMAN COMPANY, APPELLANT,

vs.

A. C. CROOM, COMPTROLLER OF THE STATE OF FLORIDA, APPELLEE.

No. [illegible] 158.

THE PULLMAN COMPANY, APPELLANT,

vs.

A. C. CROOM AS COMPTROLLER OF THE STATE OF FLORIDA, AND

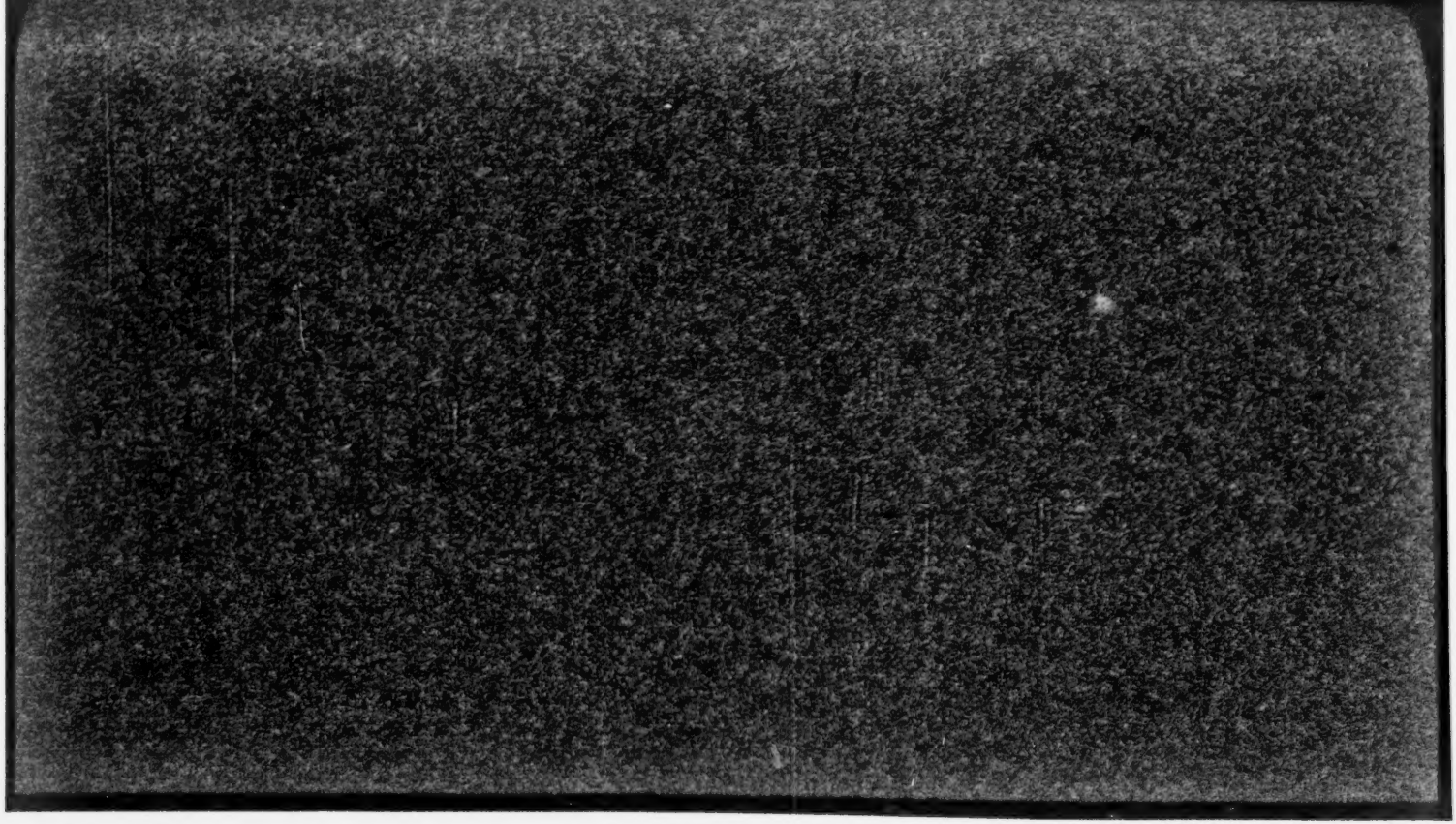
W. V. KNOTT AS TREASURER OF THE STATE OF FLORIDA, APPELLEE.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

BRIEF OF APPELLEE.

J. Y. WEST,
Attorney General,
Solicitor for Appellee.

P. K. Appleyard, State Printer, Tallahassee.



In the Supreme Court of the United States

OCTOBER TERM, A. D. 1912.

No. 250

THE PULLMAN COMPANY, APPELLANT,

VS.

A. C. CROOM, COMPTROLLER OF THE STATE OF FLORIDA, APPELLEE.

No. 507

THE PULLMAN COMPANY APPELLANT,

VS.

A. C. CROOM AS COMPTROLLER OF THE STATE OF FLORIDA,

W. V. KNOTT AS TREASURER OF THE STATE OF FLORIDA.

STATEMENT OF CASE.

The two above stated cases came to this Court upon appeal from the Circuit Court of the United States for the Northern District of Florida. Like questions being involved the cases were consolidated by agreement.

The Appellee, A. C. Croom, Comptroller, having died pending this appeal and the Appellee W. V. Knott, Treasurer, having succeeded him in the office of Comptroller, and J. C. Luning having succeeded to the office of Treas-

urer thereupon made vacant, the said Knott as Comptroller and Luning as Treasurer were by agreement and stipulation filed herein substituted as Appellee herein in the place and stead of said original Appellees.

It is not entirely clear to me that such substitution of parties can be made in a case of this character, but I mention it here only for the purpose of directing the Court's attention to the situation with regard to the parties Appellee herein and in order that consideration may be given to the question if necessary.

No. 250

The Appellant on January 3rd, 1911, filed in the United States Circuit Court of the Northern District of Florida, its bill of complaint praying that an injunction be granted restraining the Appellee from collecting from said Appellant by levy or otherwise that certain license tax imposed by the provisions of Section 47 of Chapter 5596 of the Laws of Florida, which is as follows:

"Sec. 47. All sleeping and parlor car companies operating their cars in this State shall, on or before the first day of January, 1908, and annually thereafter, report to the Comptroller of the State of Florida, under oath of the Secretary or other officer of such company, the total amounts of their gross receipts derived from business done between points in the State; and at the same time shall pay into the State Treasury the sum of one dollar and fifty cents upon each one hundred dollars of such gross receipts, and if any such company shall fail to make such report to the Comptroller and pay the tax thereon as herein provided, the Comptroller shall estimate the amount of such gross receipts from such information as he may be able to obtain, and shall add ten per cent. to the amount of such taxes as a penalty for the failure of such company to make report, and shall proceed to collect such tax, together with all costs and penalties thereon, the same as other delinquent taxes are collected."

On February 9th, 1911, appellant's application for an

injunction was heard in New Orleans by U. S. Circuit Judges Don A. Pardee, A. P. McCormick and David D. Shelby.

On February 11th, 1911, the following order was made upon appellants' application to-wit:—

"This cause came on to be heard upon an application for an injunction pendente lite before Don A. Pardee, A. P. McCormick and D. D. Shelby, Circuit Judges, sitting in Chambers in the City of New Orleans and was argued upon bill and affidavits by John E. Hartridge, Esq., for the Complainant and the Hon. Park Trammell, Attorney General of the State of Florida, for Defendant:

Whereupon, and on due consideration, the said Judges being of the opinion that Section 47, Chapter 5596 of the Laws of Florida, approved June 18th, 1907, taken in connection with Chapter 5597 of the Laws of Florida, approved the same day, provided for a graded license tax on all sleeping and parlor car companies operating their cars in the State of Florida, and is within legislative power of the State; and, further, that the said complainant can have no standing in equity to resist the tax levied under said law until it shall have made the return provided for therein and paid the taxes thereon, the said application is denied."

New Orleans, La., February 11th, 1911.

DON A. PARDEE,
Circuit Judge.
A. P. McCORMICK,
Circuit Judge.
DAVID D. SHELBY,
Circuit Judge."

Thereafter on February 28th, 1911, the Appellant entered its appeal to the Supreme Court of the United States for review of the order made.

No. 507

The Appellant in this case, by its bill of complaint filed on December 18th, 1911, set out the proceedings had

and taken in the preceding case, the order of the Court and the payment of the tax. It prayed that the then Appellee Croom, as Comptroller, be enjoined from enforcing payment from Appellant to it, under said Section 47, Chapter 5596, of the tax due on or before January 1st, 1912, and that the then Appellee Knott, as Treasurer, be directed and compelled to pay back to Appellant the sum of taxes and costs with interest thereon, paid to said Appellee in the said first mentioned case.

On December 21st, 1911, Appellant's application for an injunction was heard in New Orleans by U. S. Circuit Judges Don A. Pardee and David D. Shelby and United States District Judge T. S. Maxey, whereupon the following order was made:

"This cause came on to be heard upon application for an injunction pendente lite before Don A. Pardee, and D. D. Shelby, Circuit Judges, and T. S. Maxey, District Judge, sitting in Chambers in the City of New Orleans and was argued upon bill and affidavits by John E. Hartridge, Esq., for the Complainant and the Hon. Park Trammell, Attorney General of the State of Florida, for Defendant.

Whereupon, and on due consideration, the said Judges being of opinion that Section 47 Chapter 5596 of the Laws of Florida, approved June 18, 1907, taken in connection with Chapter 5597 of the Laws of Florida, approved the same day, provided for a graded license tax on all sleeping and parlor car companies operating their cars in the State of Florida, and is within the legislative power of the State,—

The said application is denied.

New Orleans, La., December 21st, 1911.

DON A. PARDEE,
Circuit Judge.

DAVID D. SHELBY,
Circuit Judge.

T. S. MAXEY,
District Judge."

Thereupon and on the same day the Appellant entered its appeal to this Court for review of the order made.

ASSIGNMENT OF ERRORS.

The assignment of errors in No. 250 is as follows:

"1. The Court erred in deciding and denying an interlocutory injunction to the plaintiff, as prayed in the bill of complainant.

2. The Court erred in deciding and holding that the plaintiff had no standing in equity to resist the tax levied and against which relief was sought, until the plaintiff should have made a return and paid the tax as required by the statute contended to be unconstitutional.

3. That the Court erred in and by the order made herein denying the interlocutory injunction, dated February 11, 1911."

It will be noted that it is not specifically pointed out wherein the Court erred. It is only averred in a general way that the Court was in error in entering the order denying the injunction prayed. It is not averred nor suggested that the statute violates any provision of the Federal Constitution.

The assignment of error in No. 507 is as follows:

"1. In holding that under the facts set up in the bill of complaint the plaintiff was not entitled to the injunction as prayed in the bill.

2. In holding that there were power and authority under the Constitution of the State of Florida to levy the income tax as provided in Section 47 of Chapter 5596 of the Laws of Florida complained of in the bill of complaint.

3. That the Court erred in holding Section 47 of Chapter 5596 of the Laws of Florida as a valid, existing law, and not in violation of the principle of due process of law.

4. The Court erred in holding that Section 47 of Chapter 5596 of the Laws of Florida is within the amendment of the Constitution of the United States regarding due process of law.

5. The Court erred in entering the order, entered in this case denying the prayer of the bill of complaint."

Here two questions are raised, viz:

1. Has the legislature of the State the power under the State Constitution to impose the tax objected to?

2. Does the statute referred to violate the provisions of the first Section of the Fourteenth Amendment to the Federal Constitution?

A decision of the question raised by the assignments of error in the first case, viz: Did the Court err in denying complainant's application for an interlocutory injunction is largely, though not entirely, dependent upon the conclusions reached upon a consideration of the questions raised in the second case.

We maintain that Appellant's bill of complaint in neither of the cases makes out such a case as to warrant the interposition of a court of equity, or to entitle it to the relief sought, and therefore the Court below did not err in denying the order for interlocutory injunction as alleged by Appellant.

The questions raised are so intimately related that we shall consider all of them together.

THE TAX AUTHORIZED.

The tax imposed by said Section 47 of Chapter 5596 is a graded *license tax* and is authorized specifically by the following provisions of the Florida Constitution to wit:

"ARTICLE IX."

"Section 5. The legislature may also provide for levying a special capitation tax, and a tax on licenses."

The Florida court has passed upon statutes with similar provisions imposing a gross receipt tax. The latest case being that of the Afro-American Industrial and Benefit Association vs. State, 61 Fla. 85; 54 South. Rep. 383. In this case the court sustained a statute requiring the payment of two per centum annually upon the gross receipts of insurance companies. This license

tax being required in addition to other license taxes upon the same companies.

Afro-American Industrial and Benefit Association vs. State, 61 Fla. 85; 54 South. Rep. 383.
Johnson vs. Armour, 31 Fla. 413.

The Florida court has held that there is no constitutional limitation upon the right of the State to impose a license or occupation tax.

Hardee vs. State, 56 Fla. 378.

The said Section 47 of Chapter 5596 of the Laws of Florida, approved June 18th, 1907, taken in connection with and construed with Chapter 5597 of the Laws of Florida, approved the same day, being "AN ACT Imposing Licenses and Other Taxes, Providing for the Payment Thereof, and Prescribing Penalties for Doing Business Without a License, or Other Failure to Comply with the Provisions Thereof," provides for a graded license tax.

GROSS RECEIPT TAX VALID.

A tax based upon the gross receipts has uniformly been held to be valid and is held by the courts to be a license tax, occupation tax, or excise tax, but never held to be an ad valorem or property tax.

Judson on Taxation, Sec. 226.
Rotterdam vs. Western Union Tel. Co., 127 U. S. 417.
Brown vs. Kentucky, 217 U. S. 563.
Maine vs. Grand Trunk Ry. Co., 142 U. S. 217, 227, 230.
Holmes Ins. Co. vs. New York, 134 U. S. 604.
Postal Tel. Cable Co. vs. Adams, 155 U. S. 688.
Pacific Exp. Co. vs. Seibert, 142 U. S. 339, 341.
Erie R. R. vs. Penn., 158 U. S. 431.

TAXPAYER ALLOWED A HEARING.

The said Section 47 of Chapter 5596 does allow a hearing, as the provisions thereof specifically provide for the companies to make a report of the gross receipts and it is upon the amount of gross receipts as reported by the company upon which the license tax of one dollar and fifty cents per hundred is collected. See Section 47 of Chapter 5596, of Record, p. 2.

Gallup vs. Schmidt, 183 U. S. 300-307.
Kentucky R. R. Tax Cases, 115 U. S. 339-341.

HEARING NOT REQUIRED.

To make the law constitutional, no hearing is required in license taxes, that is, where the amount is fixed.

Judson on Taxation, Sec. 319.

HEARING NOT NECESSARY WHEN VALUE FIXED BY TAXPAYER.

The courts hold that a hearing is not necessary where taxpayer fixes the value or amount upon which the fixed sum per hundred is collected.

Judson on Taxation, Sec. 320.
Peoples Nat. Bank vs. Marye, 107 Fed. 570.
Peoples Nat. Bank vs. Marye, 191 U. S. 272.

The last two named cases are directly in point and the questions there considered were very similar to those in the instant case.

NO RIGHT TO EQUITABLE RELIEF UNLESS TAXPAYER PERFORMS HIS DUTY.

These cases fully sustain the position that the company must comply with the statute and perform the duty

required of it before it has any standing in a court of equity. It must do equity before seeking equity.

Peoples Nat. Bank v. Marye, 107 Fed. 570.
Peoples Nat. Bank v. Marye, 191 U. S. 272.

UNITED STATES COURT NO JURISDICTION TO ENJOIN.

Judson on Taxation, Section 530, says:

"The rule is well established in the Federal Courts and generally in the State Courts, that a tax will not be enjoined solely on the ground of unconstitutionality. The general rule that relief in equity can only be sought in the absence of an adequate remedy at law is reinforced in the Federal Courts by the provisions of the United States statutes. 'Although this statute is only declaratory of what was always the law, it must at least,' said the Supreme Court, 'have been intended to emphasize the rule and to impress it upon the attention of the courts.'

"It is also provided by another section of the United States statutes, that the writ of injunction shall not issue against any State Court except in relation to bankruptcy proceedings. The rule is also emphasized by still another provision of the Statutes that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' This last statute, however, applies only to taxes levied by the United States and is to be considered in connection with the provisions of the Internal Revenue law."

"It was said, however, by Justice MILLER with reference to this last provision, 'Though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared, if courts of justice could in any case, interfere with the process of collecting the taxes on which the government depends for its continual existence.' It is a wise policy."

The law as recited by Judson is supported by the court decisions generally:

Foster on Federal Practice, Vol. 1, 133.
Bates on Fed. Practice, Vol. 1, 553.
Allen vs. Pullman Palace Car Co., 139, U. S. 658.
Shelton v. Platt, 139 U. S. 591.
Joyce on Injunction, Vol. 2, Sec. 1189.
United States Tel. Co. v. Grant, 32 N. E. 1005.
High on Injunctions, Vol. 1, Sec. 505.
Baldwin v. Tucker, 16 Fla. 258.
Odlin v. Woodruff, 31 Fla. 160.
Peoples Nat. Bank of Lynchburg vs. Marye, 107, Fed. Rep. 570.
Pittsburg, etc. Ry. Co. vs. Board of Public Works, 172 U. S. 32.
Arkansas Bldg. Ass'n vs. Madden, 175 U. S. 273.
Stanley vs. Supervisors of Albany, 121 U. S. 536.
Swift & Co. vs. U. S. 111 U. S. 22.
21 Cyc. p. 820.

In the case of Allen vs. Pullman Palace Car Co. 139, U. S. 658, the court says:

"Purely injunction bills can not be maintained to restrain the collection of taxes upon sole ground of their unconstitutionality."

"When in a suit in equity this court finds on examination of the proofs, nothing which makes a proper case for equity, it is its duty to recognize the fact and give effect though not raised by the pleadings nor suggested by counsel."

DOES NOT SHOW BY BILL IRREPARABLE INJURY

It is not sufficient to simply allege that the complainant has no adequate remedy at law and that his damage will be irreparable. He must state facts in his bill to enable the court to determine whether or not his alleged injury will be irreparable.

Indian River Steamboat Co. vs. East Coast Transportation Co., 28 Fla. 387, 10 South. 48.

Town of Orange City vs. Thayer, 45 Fla. 502, 34 South. 573.
Beach on Injunctions, Sec. 34.
Metcalf Co. vs. Martin, 54 Fla. 531.
Shelton vs. Platt, 139 U. S. 591.
Allen vs. Pullman Palace Car Co., 139 U. S. 658.

NO EQUITY IN BILL—LAW REMEDY.

A levy upon personal property under an unconstitutional law would be a void act, therefore a trespass, and party aggrieved would have his remedy at law.

High on Injunction, Vol. 1, Sec. 505.
Baldwin vs. Tucker, 16 Fla. 258.
Fla. Packing Ice Co. v. Carney, 51 Fla. 190.
Davison vs. N. C., 96 U. S. 106.
Joyce on Injunction, Vol. 2, Sec. 1189.

"A Federal court will not enjoin the collection of a tax which is only a personal charge against the party taxed, or charge upon his personal property."

Linehon Ry. Trans. Co. vs. Pendergross, 70 Fed. 1.

NO ABUSE OF DISCRETION BY LOWER COURT.

It is submitted that the appellant has failed to make out a case showing any abuse of the discretion vested in the lower court in passing upon the application for an interlocutory injunction, and that it is necessary to make such showing in order to procure a reversal of the lower court.

Street Fed. Equity Practice, Vol. 3, Sec. 2386.
Vogel vs. Warsing, 146 Fed. 949-953.

CONCLUSION.

It is respectfully submitted that the record discloses no error; that the bill of complaint alleges no matters or

things entitling complainant to the relief sought, and that the lower court is sustained by both the law and the equity practice in making its order of February 11th, 1911, denying the complainant an interlocutory injunction.

Respectfully submitted,

T. F. WEST,
Attorney General,
Solicitor for Appellee.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 250

THE PULLMAN COMPANY, APPELLANT,

vs.

A. C. CROOM, COMPTROLLER OF THE STATE OF FLORIDA, APPELLEE.

No. 507

THE PULLMAN COMPANY, APPELLANT,

vs.

A. C. CROOM, COMPTROLLER OF THE STATE OF FLORIDA, ET AL., APPELLEE.

APPEALED FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

Supplemental Memorandum Brief for Appellee.

The real, vital question involved in these cases, as I see it, is whether or not the Legislature of the State of Florida has the power, under the constitution of the State of Florida, to impose the tax upon complainant which it complains of and seeks to escape by this litigation.

The Supreme Court of the State of Florida has gone into this constitutional question more fully since the preparation of the original brief for appellee herein, by my predecessor, than it had before that time, and in view of the doctrine that a decision by the highest court of a State upon a question of constitutional law, arising under the constitution of such State, is binding upon and will be adopted and followed by the Federal Courts, I ask leave to call the Court's attention, by this supplemental memorandum brief, to the Florida decisions upon the subject and other cases referred to as supporting the rule announced in such decisions.

Before referring to the Florida decisions, I would direct the Court's attention to the rule of construction above mentioned:

A decision of the highest court of the State upon questions of constitutional law arising under the constitution of such State, is binding upon the Federal Courts.

Manley vs. Park, 187, U. S. 547.
L. & N. R. R. Co. vs. Kentucky, 183 U. S. 503.
Danville Wa[illegible] Co. vs. Danville, 180 U. S. 619.
Freeport Water Co. vs. Freeport, 180 U. S. 587.
Wilks Co. Com'rs. vs. Coler, 180 U. S. 506.
Moffitt vs. Kelley, 218 U. S. 400.

And also the rule of interpretation in this Court of a State statute which has been passed upon by the highest Court of the State, as follows:

An interpretation placed by the highest Court of a State upon a State statute is conclusive upon the Federal Courts.

Watson vs. Maryland, 218 U. S. 173.
Kentucky Union Co. vs. Kentucky, 219 U. S. 140.
Lindsley vs. Natural Gas Co., 220 U. S. 61.

The Supreme Court of State of Florida has held that a gross receipts tax, such as the tax imposed by the

statute attacked in these suits, is within the power of the Legislature of the State of Florida under the constitution of the State of Florida.

Afro-Am. Ind. and Benefit Ass'n. of the U. S. of America vs. State of Florida, 61 Fla. 85.
Pen. Ind. Ins. Co. vs. State of Fla., 61 Fla. 376.

"Neither the State nor the Federal Constitution contains any express limitations upon the power of the Legislature to provide by a duly enacted statute for imposing and collecting a tax on occupations or licenses; but such power should not be so exercised as to deprive any person of property without due process of law, or so as to deny to any person the equal protection of the laws."

Jackson vs. Neff, 64 Fla. 326.
Hardee vs. Brown, 56 Fla. 377.
Keeney vs. Comptroller of N. Y., 222 U. S. 525.
Bells Gap R. Co. vs. Pa., 134 U. S. 232.

"In imposing license or occupational taxes, the only limitations upon a duly enacted statute are that no person shall be deprived of property without due process of law or denied the equal protection of the laws. The levy of an advalorem tax upon property, and also a license or occupational tax upon the use of same property is not double taxation. A license fee is not a tax within the meaning of the provisions of the organic law requiring uniformity of rates and just valuations of property for purposes of taxation."

Jackson vs. Neff, supra.
Cooley on Taxation (3rd Ed.), 392.
Harder's Fireproof Storage and Van Co. vs. City of Chicago, 235 Ill. 58.
Ayers vs. City of Chicago, 239 Ill. 237.
Garrett vs. Turner (Pa.), 84 Atl. Rep. 354.

Respectfully submitted,
T. F. WEST,
Attorney General,
Solicitor for Appellee.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. ~~507~~ 158

THE PULLMAN COMPANY, APPELLANT,

vs.

A. C. CROOM, AS COMPTROLLER OF THE STATE OF FLORIDA, AND W. V. KNOTT, AS TREASURER OF THE STATE OF FLORIDA, APPELLEES.

MOTION TO ADVANCE.

JOHN E. HARTRIDGE,
FRANK B. KELLOGG,
Solicitors and Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 507.

THE PULLMAN COMPANY, APPELLANT,

vs.

A. C. CROOM, AS COMPTROLLER OF THE STATE OF FLORIDA, AND W. V. KNOTT, AS TREASURER OF THE STATE OF FLORIDA, APPELLEES.

MOTION TO ADVANCE.

The appellant respectfully moves the court to advance this cause to be heard with the case of The Pullman Company, Appellant, *vs.* A. C. Croom, as Comptroller of the State of Florida, Appellee, No. 250 on the calendar for the October term, 1912; the two cases to be argued as one case, in the time allowed for one case.

Statement.

This case (No. 507) and No. 250 are practically identical. The question presented for the determination of this court is precisely the same in each case; both arise under the same statute, upon the same subject, upon substantially the same state of facts and affect the same

parties, who are represented in this court by the same counsel.

Each case brings up for review, under the provision of the act of June 18, 1910 (36 Stat. L., 557), now embodied in Section 266 of the Judicial Code, permitting a direct appeal to the Supreme Court, an order of the Circuit Court for the Northern District of Florida (three judges sitting, as required by that act) denying the application of the appellant, The Pullman Company, for an interlocutory injunction against the appellee, Comptroller of the State of Florida, to restrain him from proceeding to assess and collect from appellant the gross-earnings tax imposed by Section 47 of Chapter 5596 of the Laws of Florida.

The differences between the two cases are slight, and, as we think, unimportant. Certain it is that such differences have no bearing whatever on the question presented for the consideration of this court. In so far as they have any significance, it is to give ground for the contention that in case No. 250 the real question may be avoided because the appellant filed its bill to restrain the enforcement of the statute claimed to be unconstitutional without first making the return and paying the tax prescribed by that statute—a point which cannot be made in No. 507. The facts are these:

Section 47 of Chapter 5596 is a re-enactment, in a compilation or codification of the laws of Florida, of a statute originally passed June 1, 1895. It provides that sleeping or parlor car companies operating in Florida shall report annually to the Comptroller of the state the amount of their gross earnings on business done in the state, and shall pay a tax of 1½ per cent. on such gross earnings. Section 46 of the same chapter (5596) pro-

vides for the assessment and taxation of the cars and other property of such companies on an *ad valorem* basis. This latter provision was first enacted in 1907. Chapter 5597, which was also first enacted at the session of 1907, imposes a license tax of a specific sum on each car owned or operated by such companies. (Record No. 250, pp. 1-6; No. 507, pp. 1-6.)

Appellant insists that this gross-earnings tax is invalid under the constitution of Florida and is in conflict with the Fourteenth Amendment to the Constitution of the United States, and that is the only real question involved in either case. Acting on this theory, appellant paid the *ad valorem* property tax and the car-license tax, but declined to make the gross-earnings return which the statute called for. The state authorities made no attempt to enforce the gross-earnings tax until shortly prior to January 3, 1911, when the appellee Croom, as Comptroller of the state, gave notice of his intention to "estimate" appellant's gross earnings during the years 1909 and 1910 and to assess the prescribed tax thereon and enforce collection of the same. (Record No. 250, pp. 8-9, 12-13.) Thereupon, on January 3, 1911, appellant filed its bill for injunction in case No. 250, and made application for an interlocutory injunction in accordance with the practice prescribed in the act of June 18, 1910. (Record No. 250, pp. 19-26.) The application was denied on February 11, 1911, by Circuit Judges Pardee, McCormick and Shelby (Record No. 250, p. 27), and appellant promptly appealed to this court, as permitted by the act of June 18, 1910.

No opinion was filed with the order refusing the injunction, but the order itself recites that the judges are of the opinion that the statute challenged "provides for

a graded license tax * * * and is within the legislative power of the state, and further that the said complainant can have no standing in equity to resist the tax levied under said law until it shall have made the return provided for therein and paid the taxes thereon." (Record No. 250, p. 27.)

After the appeal in No. 250 was taken the appellee Croom again demanded that appellant report its gross receipts in Florida for the years in question in that case. Appellant made the return under protest; appellee assessed the prescribed tax on the basis of such earnings, and issued a warrant to the sheriff, who levied upon one of appellant's cars, and appellant paid the tax and costs, in order to release the car. (Record No. 507, pp. 14-15, 17-21.) Thereafter appellant filed its bill in No. 507 against appellee Croom, as Comptroller, and W. V. Knott, as treasurer of the state, for an injunction forbidding the assessment and enforcement of the gross-earnings tax for the year 1911, with a prayer that the defendant Knott be directed to repay to appellant the amount so paid under the duress and to release the property levied upon for taxes of 1909 and 1910. (Record No. 507, pp. 15-16.) An application for temporary injunction was duly made under the act of June 18, 1910; the application was heard and denied on December 18, 1911, by Judges Pardee, Shelby and Maxey, and appellant at once appealed to this court. (Record No. 507, pp. 24-27.)

Thus it will be seen that, upon the merits, at least, the sole question for argument and consideration in this court in either case is whether Section 47 of Chapter 5596 of the Laws of Florida, imposing a gross-earnings tax, in invalid under the constitution of Florida or under

the Constitution of the United States. And, upon the merits, the question is presented in precisely the same way in each case. The averments of the bill in No. 507 are copied almost literally from the bill in No. 250, except for the matter in No. 507 dealing with the assessment and enforcement of taxes for 1909 and 1910.

We respectfully submit that under these conditions it is to the interest of all concerned that the two cases be consolidated for the purpose of argument and heard as one case. If, as seems to have been supposed, the difference between the cases with respect to matters preliminary to the filing of the bill may be substantial enough to raise a doubt whether the main question will be considered on its merits in No. 250, then we submit that there is the more reason why No. 507 should be advanced and the cases heard together.

JOHN E. HARTRIDGE,
FRANK B. KELLOGG,
Solicitors and Counsel for Appellant.